145-247

RECORD, CASE No. 13,531.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 348.

JOHN W. S. EARNSHAW, PLAINTIFF IN ERROR,

vs.

JOHN CADWALADER, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF PHILADELPHIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 6, 1889.

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1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between John W. S. Earnshaw, plaintiff, and John Cadwalader, collector of customs for the district of Philadelphia, defendant, in a plea of assumpsit, a manifest error has intervened, to the great damage of the said John W. S. Earnshaw, as in his complaint has been stated, and, as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this first day of March, A. D. one thousand eight hundred and — nine, and in the one hundred and thirteenth year of the Independence of the said United States.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To John Cadwalader, collector of customs for the district of Philadelphia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein John W. S. Earnshaw — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this first day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

WM. BUTLER, *Judge.*

I accept service of this citation.

JOHN R. READ,
Att'y for Defendant.

M'ch 2, 1889.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN W. S. EARNSHAW
vs.
JOHN CADWALADER, Collector of Customs for the District of Philadelphia.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1887, No. 61.

It is thus contained:

Be it remembered that on the twentieth day of January, in the year of our Lord one thousand eight hundred and eighty-eight, John W. S. Earnshaw, by his attorney, Robert Ralston, Esq., comes into court here and sues forth therefrom a writ of summons against John Cadwalader, collector of customs for the district of Philadelphia, which, with the endorsement and return thereto, is in the words and figures following, to wit:

4 UNITED STATES,
Eastern District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon John Cadwalader, collector of customs for the district of Philadelphia, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of February next, to answer to John W. S. Earnshaw in a plea of assumpsit; and have you then there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 20th day of January, A. D. 1888, and in the 112th year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

5 [Endorsed:] No. 61. Circuit court, October session, 1887. Earnshaw *vs.* Cadwalader, collector, &c. Summons. Returnable on the first Monday of February next. Robert Ralston, attorney for plaintiff. Filed January 23, 1888.

I accept service of the within writ and request the U. S. district attorney for the E. dist. of Penna. to enter an appearance for me.

JOHN CADWALADER,
Collector of Customs.

6 And afterwards, to wit, on the 28th day of January, A. D. 1888, the plaintiff, by his attorney, Robert Ralston, Esq., comes into court here and files his declaration and bill of particulars, which, being read, is as follows, to wit—

Circuit Court of the United States, Eastern District of Pennsylvania.

JOHN W. S. EARNSHAW, Plaintiff,
vs.
JOHN CADWALADER, Collector, Defendant.

Plaintiff's Declaration.

And the plaintiff says—

That plaintiff duly imported and entered at the port of Philadelphia the merchandise described in the bill of particulars annexed.

That defendant was at the time of said entry collector of customs of the United States at the port of Philadelphia.

That plaintiff, in order to obtain possession of said merchandise, was compelled to pay the defendant as such collector, in excess of the lawful rate of duty on said merchandise and of the amount required by law, the sum of seventy-one $\frac{61}{100}$ dollars.

7 That plaintiff upon each entry of said merchandise filed with said defendant due and timely protests in writing against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

That plaintiff on each entry made due and timely appeals to the Secretary of the Treasury.

That the said Secretary affirmed the decision of defendant upon said entries within ninety days next preceding the commencement of this action; all of which is specifically set forth in the bill of particulars, hereto annexed and made a part hereof.

Wherefore plaintiff demands judgment against defendant for the sums so exacted as aforesaid, with interest on the several sums named in the bill of particulars from the several dates of payment as appear therein.

ROBERT RALSTON,
Attorney for Plaintiff.

8

Bill of Particulars.

U. S. Circuit Court.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

JOHN W. S. EARNSHAW
vs.
JOHN CADWALADER, Coll'r.

	Importer.	Merchandise.	Quantity.	Where from.	Vessel.	Date of invoice.	Date of entry.	Date of payment.	Excess of duty claimed.	Date of protest.	Date of appeal.	Date of Secretary's decision.
										1887.	1887.	1887.
1	John W. S. Earnshaw.....	Iron ore...	1,298,840 lbs.	Porman....	Mariehann.....	Dec. 13, '86	Feb. 3, '87	Feb. 3, '87	21 75	Oct. 19	Oct. 19	Dec. 29
2	John W. S. Earnshaw.....	Iron ore...	1,712,320 lbs.	Porman....	Maria Repetto...	Feb. 14, '87	April 26, '87	April 26, '87	27 90	Oct. 19	Oct. 19	Dec. 29
3	John W. S. Earnshaw.....	Iron ore...	1,679,790 lbs.	Porman....	Galileo S.....	Feb. 23, '87	April 26, '87	April 26, '87	21 96	Oct. 19	Oct. 19	Dec. 29
									71 61			

9 (Endorsed:) Declaration and bill of particulars. John W. S. Earnshaw *vs.* John Cadwalader, coll'r. Robert Ralston, plaintiff's attorney. Filed January 28, 1888.

10 And afterwards, to wit, on the 10th day of February, A. D. 1888, the defendant, by his attorney, comes into our said court here and files his plea in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit, Oct. Session, 1887.

JOHN W. S. EARNSHAW
vs.
JOHN CADWALADER, Collector. } No. 61.

And the said defendant, by John K. Valentine, Esquire, his attorney, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

JOHN K. VALENTINE,
Attorney for Defendant.

11 [Endorsed:] No. 61. Oct. sessions, 1887. In the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit. John W. S. Earnshaw *vs.* John Cadwalader, collector, &c. Plea of defendant. Filed February 10, 1888. John K. Valentine, attorney for defendant.

12 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the 11th day of October, A. D. 1888, come the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit: 1, William S. Johnson; 2, Charles B. Mayberry; 3, William B. Weir; 4, Charles Santee; 5, William A. Ker; 6, Jacob Resser; 7, Henry M. Wetherill; 8, Charles A. Klinefelter; 9, Alfred McKee; 10, David Williams; 11, Morris Earle; 12, Thomas Wood, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, this 16th day of October, A. D. 1888, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say that they find for the defendant.

13 And afterwards, to wit, on the fourth day of December, A. D. 1888, come the parties aforesaid, by their attorneys aforesaid; and, the court being fully advised in the premises, it is ordered that judgment be entered on the verdict in favor of defendant and against the plaintiff.

Whereupon judgment is entered accordingly.

14 *Bill of Exceptions.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania, Sitting at Philadelphia, October Sessions, 1888.

EARNSHAW *vs.* CADWALADER. } No. 61. October Sessions, 1887.

Be it remembered that in the said term of October sessions, A. D. 1887, came the said plaintiff into said court and impleaded the said defendant in a certain action of contract, in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut* pleas); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held before the Honorable William Butler, sitting as judge of the said court, on Thursday, the eleventh day of October, A. D. 1888, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled, at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue;
15 and upon the trial it appearing that there was another action against same defendant, in which S. B. Schlesinger *et al.* were plaintiffs, to recover custom duties alleged to have been wrongfully exacted of them upon certain importation- of iron ore into the port of Philadelphia, and involving the same issue as this action, by consent of parties and approval of the court, the two actions were tried together.

It was admitted at the trial that the plaintiff had seasonably paid, protested, appealed, and brought suit.

The same form of protest was used for all the importations in suit, a copy of which was as follows:

Protest.

OCTOBER 19, 1887.

Hon. John Cadwalader, collector of customs of the port of Philadelphia.

SIR: I hereby give you notice of my dissatisfaction with your ascertainment and liquidation of a duty of seventy-five cents per ton on 1,298,840 pounds of iron ore, the quantity reported by the United States weigher, as the duty on a cargo of iron ore imported by me, per bark Marieham, from Porman, February 3d, 1887.

I claim that you err in exacting duty on the full weight of 1,298,840 lbs., and I pay the same under protest, because the
16 importation is dutiable as merchandise which is described as "iron ore" in act of March 3, 1883, chapter 121, sec. 6, Schedule C, and "iron ore" was and is understood among dealers

in and consumers of such iron ore in this country to refer and did refer to iron ore in the condition of dryness in which it is sold in trade, which condition of dryness is usually ascertained in trade by subjecting the iron ore to a temperature of 212° Fahrenheit; but you have levied the rate of seventy-five cents per ton on my importation when mixed with and the weight increased by a considerable per cent. of water, thereby making me pay, in violation of law, that rate of duty on water, because the iron ore of commerce, to which the said tariff law applies, is iron ore in a dry state—*i. e.*, free from water not chemically combined—and because, although the method of ascertaining the amount of such mechanically mixed moisture is well known, easily applied, and actually used between buyers and sellers of such ores in this country, you have refused to ascertain the true taxable weight of the iron ore of this entry in this or any other way or make any allowance for such mechanically and accidentally combined moisture in ascertaining the weight.

Very respectfully, J. W. S. EARNSHAW.

17 The plaintiff introduced evidence tending to show that samples, representative of the whole mass, were taken by samplers (Young, Garratt, and Sieler) on the arrival of the different cargoes, which samples were delivered to Messrs. McCreath and Garrett, chemists, in the same condition as taken, in order that the amount of moisture mechanically present and the amount of metallic iron might be ascertained.

The plaintiff then introduced the following evidence:

THOMAS H. GARRETT:

Q. What is your business?

A. Analytical chemist.

Q. Were anal*y*ses made at your office under your direction of the samples taken from the cargoes by Mr. Young and Mr. Garrett, the two men who have just testified?

A. They were, sir.

Q. Will you please state to the court and jury what the results were?

A. They were made in pursuance of moisture. I cannot tell you without reference to my notes. I cannot tell you the exact amount.

18 Q. Please refer to your notes made at the time and state the results of your examination of these samples.

A. The samples from the Eglentine contained 12,143 per cent. of water; that was a Camerata ore. The Amie Dora, also a Camerata ore, contained 4,614 per cent. of water. The Marieham, a Porman ore, contained exactly 5 % of moisture.

Q. Is this moisture which you speak of chemically combined with the ore?

A. No, sir; I call it moisture because I do not consider it to be chemically combined.

Q. Is there water which is chemically combined with the ore?

A. In some ores; in some others not.

Q. Which is in chemical combination with the ore?

A. Yes, sir.

Q. Does this moisture vary in ores which come from the same mine, the chemical ingredients of which are constant?

A. Those two ores just mentioned, the two Camerata ores, are from the same place. One is 12 and the other is, I believe, 4 %.

Q. It varies?

A. It varies.

Q. To what is this variation due?

19 A. Either to rain or to exposure of some sort to the elements.

Q. Is this moisture a part of the ore?

A. It is not.

Q. It is not a constituent part of the ore?

A. It is not, and the amount depends altogether to its exposure to wet.

Q. How do you find out how much moisture an ore contains?

A. By putting it in what we call the water bath. It is an oven surrounded on all sides by water, and the ore is placed in the oven and shut up and kept there at the boiling point until the ore ceases to lose weight.

Q. State whether or not this heat has any effect upon the chemical ingredients of the ore.

A. It has no other effect than simply to dry it.

Q. Could this result be obtained in any other way?

A. Spreading it out in the sunshine would do the same thing.

Q. As I understand it the heating at 212° is a quick way of arriving at the same result which would be obtained by spreading it out and letting it dry in the sun?

A. Yes, sir; the only object in using what we call the water bath or water oven is to save time.

Q. It has no effect whatever on the——

20 A. (Interrupting.) No effect on the chemical composition of the ore.

Q. What is left is the ore?

A. What is left is the pure ore.

Cross-examination:

Q. What is your definition of the words "iron ore"?

A. It is an oxidized or a sulphurated combination of iron and more or less sandy matter and clay, possibly.

Q. What were the constituent articles of these samples of iron ore that you examined?

A. The examination that we made only determined the amount of iron and the amount of phosphorous.

Q. Only determined the amount of iron and phosphorous?

A. Yes, sir.

Q. Were they in chemical or mechanical combination?

A. Chemical.

Q. Then your examination did not disclose mechanical combination?

A. No, sir.

Q. Wasn't this water mechanical?

A. Yes, sir.

Q. That was the only mechanical combination that your examination disclosed?

A. It was.

21 Q. Was there any peculiar moisture about this iron ore when you first examined it?

A. I don't exactly understand.

Q. I will use the word "exceptional," then. Was there any exceptional moisture apparent to the naked eye before you commenced your examination?

A. I can't say, for I don't recollect.

Q. Have you ever examined iron ore just as it has been brought from the pit?

A. Occasionally.

Q. Isn't there more or less moisture mechanically combined with the iron then?

A. In some cases.

Q. It varies a great deal, doesn't it?

A. No, sir; it couldn't vary a great deal, for this reason: That we are obliged often to dry ores that we otherwise would not dry except for some particular reason. They wished to know how the iron direct from the mine—we are obliged to grind our ore to a powder before we can make any examination, and those ores that we grind contain an exceptionally small amount of water.

Q. Isn't it a matter of fact that the constituent part of iron ore which you speak of as moisture——

22 Mr. HALL: That is objected to because it assumes that this moisture is a constituent part of the ore.

Judge BUTLER: It was hardly mentioned in that sense—as contained in the iron.

The DISTRICT ATTORNEY: There is no doubt that water is a mechanical constituent of every piece of iron ore that is found—to some extent.

The WITNESS: If it is, it is so exceedingly small that it amounts very often to not over a few hundredths of a per cent.

Q. Take the large majority of iron ores that are mined by the producers of iron ore in this country and in other countries. Isn't it a fact that there is more or less of a percentage of water in every piece of iron ore that is brought to the earth's surface?

A. In a large number, but not in all.

Q. A large number, but not in all?

A. Yes, sir.

Q. What is the average percentage?

A. That would be an impossibility to say.

Q. You cannot say. You have examined a great many specimens, have you not?

A. A great many.

Q. Then within the range of your examination what is the average percentage?

23 A. Well, do you include foreign ores as well as those mined here?

Q. Yes.

A. I should say they vary from a few hundredths of a per cent. up to 16 %.

Q. I suppose that the quantity of water in the various kinds of iron ore depends a great deal on the locality from which they are mined and the character of the ore, does it not?

A. The character of the ore determines entirely how much moisture it will hold. We have a large number of hard ores here that contain none at all scarcely.

Q. That percentage varies as much in the domestic ores as in foreign ores, comparatively speaking, doesn't it?

A. I think not.

Mr. HALL: I object to any inquiry in regard to domestic ore. There is a question which we are going to run against in this case, which is whether the inquiry is to be confined to domestic or imported ore, and sooner or later I should like to present to the court this matter.

Whether it is of much importance in relation to this witness or not I don't know, but I want to be understood as reserving any rights.

DISTRICT ATTORNEY:

24 Q. Is it not a matter of fact that water is a natural constituent of iron ore and not an accidental one?

A. It is of some and not of others, but that, we understand, is chemical water.

Q. I am speaking of whether it is not mechanically a constituent of iron ore, as well as silicate and other substances.

A. I say sometimes it is and sometimes it is not.

Q. Does your statement apply to both kinds of ores, foreign and domestic?

A. It does.

Redirect examination:

Q. I understand that your answer to that question only referred to chemically combined. When you said it was a natural constituent of the ore you meant chemically combined water?

A. Yes.

Q. Do you regard this moisture, which is merely mechanically present, a part of the ore?

A. I don't regard it any more a part of the ore than I do wet on a sponge. A dry sponge weighs, say, an ounce. It may take up two or three ounces of water. That is an extreme case, of course; but I regard these porous ores as simply holding water mechanically, the same as a sponge.

25 Q. But there is in these ores water that is not chemically combined?

A. Yes, sir.

Q. At what heat Fahrenheit can the water be removed?

A. 212 degrees.

Q. How many degrees does it take to get rid of this chemical water?

A. A great deal of heat.

Q. Is it as high as 1,000?

A. I should suppose it is.

Recross-examination:

Q. As a matter of fact, a large part of the moisture of which you speak is found in the iron ore when it is brought to the earth's surface, is it not?

A. No, sir; not always.

Q. I don't say always, but ordinarily.

A. No, sir.

Q. In what cases is it not so?

A. In these very Porman ores, to the best of my information.

Q. If you have not been at the pit and have not seen it brought up you cannot answer the question. Did you ever see any ore brought from any pit to the earth's surface that had not some moisture or water in the mechanical combination?

26 A. I have no recollection of having been at iron mines.

Q. Any ore, I say, brought from a pit.

A. Yes, sir.

Judge BUTLER: Are you speaking now of iron?

The DISTRICT ATTORNEY: Any iron. He said he had no recollection of being at an iron pit at any time.

Judge BUTLER: Confine yourself to iron.

Question withdrawn.

Q. You consider silicate any part of the iron ore?

A. It is a part of the general constituent of iron ores—that is, all iron ores contain more or less of it.

Q. It is mechanically mixed with it; it is not in chemical combination with it?

A. No, sir; it is generally mechanically mixed.

STEPHEN P. SHARPLES:

Q. What is your business?

A. I am State assayer of ores and metals for the State of Massachusetts, and reside in Cambridge.

Q. You have heard the testimony of Mr. Garrett, who has just left the witness stand?

A. I have.

27 Q. Is that moisture which he testified was contained in these ores chamically combined with the ore?

A. I don't so consider it.

Q. Is it a part of the ore?

A. It is no part of the ore.

Q. Does heating at 212 degrees Fahrenheit have any effect upon the ore?

A. Merely to dry out the extraneous moisture.

Q. Could this result be obtained in any other way?

A. It can by exposing it to the sun.

Q. And it would evaporate?

A. It would evaporate just the same as a sponge would dry out.

Cross-examination:

Q. Do you consider silicate any part of the iron ore?

A. I do. As it is mined it generally has more or less with it and other gangue with it.

Q. And other articles?

A. Yes, sir.

Q. What is gangue?

A. Gangue, meaning the accompanying rocks.

Q. What is your definition of iron ore?

A. Iron ore is the ore as it comes from the earth, accompanied by the oxygen united with the iron and the minerals which it is impossible to separate by any economical process when sorting the ore at the mouth of the mine.

28 Q. Iron ore, as I understand you, is the substance as it comes from the earth?

A. The mineral substance as it comes from the earth.

Q. And that is rather a precise definition of the word, isn't it?

A. I think it is a close definition.

Q. You regard it as accurate?

A. Yes, sir.

Judge BUTLER: That is not the whole definition, and I don't know whether when he used the phrase accurate definition he confines it to the term counsel uses or to the term he uses.

The WITNESS: To the terms I use.

Judge BUTLER: His term was a little broader than the term you (the district attorney) used.

Q. Iron ore, as I understand you, is the substance—the mineral substance—that comes from the pit to the surface of the earth, isn't it?

A. No, sir; not necessarily.

Q. Wherein am I wrong?

A. In taking out the ore from the earth there is generally more or less rock removed with it. That rock is removed at the mouth of the pit. The ore is sorted over, and then that portion

29 which cannot be readily separated from the iron ore is left with it, and that, together with the oxide of iron, constitutes the iron ore of commerce.

Q. And what is that called that is separated from it?

A. Gangue, rock.

Q. And that accompanies it as it comes from the mines?

A. It is raised from the mine with it.

Q. And while in the mine is in chemical combination with the ore, isn't it?

A. Simply in mechanical combination.

Q. Just as other substances after that combination has been made?

A. Yes.

Q. As I understand it, after it is first brought up to the mouth of the pit it is made a little more valuable by separating certain articles that are in mechanical operation with it?

A. Yes, sir.

Q. And those articles that are separated from it are called gangue?

A. Yes; or mineral or rock.

Q. And that which is left you designate as iron ore?

A. Yes, sir.

Q. How much ore do you analyse in a year?

30 A. Some years more and some less.

Q. That is a pretty general answer.

A. My business is a very general one.

Q. How many times do you analyse iron ore in a year?

A. Three years ago I analysed a great deal; this last year a very little.

Q. What kind of ores do you analyse?

A. Domestic ores entirely, I might say.

Q. Have you ever analysed foreign ores?

A. A few.

Q. When?

A. Some four or five years ago.

Q. What iron ores?

A. Iron ores in dispute.

Q. Give me the name of the ores.

A. The Government claimed it was an iron ore, and the plaintiffs manganeze ore.

Q. Can't you tell me the title of the ore?

A. No; I don't know it.

The certificates of the chemist, Mr. McCreath, to whom the samples of the remaining cargoes were delivered, were as follows, and it was admitted that he would testify to what he stated in these certificates:

31 "Andrew S. McCreath, chemical laboratory.

HARRISBURG, PA., *August 18th*, 1886.

Messrs. Naylor & Co., New York.

GENTLEMEN: The sample of Camerata iron ore taken by me on August 17th, 1886, from S. S. Gladiolus while discharging at Philadelphia—

Lost, on being dried at 212° F.:
Moisture, 8.659 per cent.
And contained, dried at 212° F.:
Metallic iron, 54.500 per cent.

Yours respectfully, ANDREW S. McCREATH."

"Andrew S. McCreath, chemical laboratory.

HARRISBURG, PA., *April 28th*, 1887.

Mr. Alfred Ernshaw, Philadelphia.

DEAR SIR: The sample of iron ore taken by me on April 27th, 1887, from bark Marie Repetto, while discharging at Phila-
32 delphia—

Lost, on being dried at 212° F.:
Moisture, 4.870 per cent.
And contained, dried at 212° F.:
Metallic iron, 51.987 per cent.

Yours respectfully, ANDREW S. McCREATH."

"Andrew S. McCreath, chemical laboratory.

HARRISBURG, PA., *May 3d*, 1887.

Mr. Alfred Ernshaw, Philadelphia.

DEAR SIR: The sample of iron ore taken by me on May 2d, 1887, from bark Galileo S., while discharging at Philadelphia—

Lost, on being fried at 212° F.:
Moisture, 3.912 per cent.
And contained, dried at 212° F.:
Metallic iron, 51.400 per cent.

Yours respectfully, ANDREW S. McCREATH."

33 The plaintiffs then introduced evidence tending to show that the cargo of the Amy Dora when discharged at Philadelphia weighed (custom-house weight) 2,341.6 tons, and contained 4.614 per cent. of -oisture mechanically present; that this cargo was transported by rail on open flat cars, exposed to the weather, to Catasauqua, Penn., ninety-six miles distant, and during the months of July, August, and September of 1886, while on these cars at Catasauqua, lost a little over seventy-eight per cent., eighty-five tons, of this water.

LUTHER S. BENT, vice-president and general manager of the Pennsylvania Steel Company at Steelton, Pa., employing 3,500 men, testified:

Q. What do you make?
A. We make steel in its various varieties; principally steel rails.
Q. To what extent and how long have you purchased imported iron ore?
A. Ten years past; to the extent of one to two millions of tons.

Q. What is the nature of these foreign ores—Spanish and African—of the sort that are in suit in these cases, so far as their hardness is concerned?

34 Q. You are familiar with these ores—Spanish and African?

A. Yes, sir; their general character is that of a soft, spungy ore, readily reduced.

Q. Do or do not such ores contain moisture or free water?

A. Yes, sir; to a greater or less extent.

Q. Does this amount vary in ores in which the constituent parts of the ore remain practically constant?

A. It does vary.

Q. To what is this variation due?

A. To the mechanical absorption of moisture of water.

Q. To what extent does this variation occur?

A. Well, sir, from a fraction of one per cent. up to the extent of twelve, I should say, in a general way.

Q. Is that fraction of one per cent. a material amount of water? What, in your opinion, is that?

A. Commercially we do not consider it when it is less than one per cent.

Q. Do dealers in buying and selling these imported ores which you have described take any method to ascertain or any means to ascertain the amount of moisture or free water contained in them?

A. Yes, sir.

Q. In buying and selling these ores, what is the usual
35 stipulation in regard to the ascertainment of this free water?

A. The question of moisture is left to a chemist, to be selected, satisfactory to both parties, and his determination shall be final.

Q. And who bears the expense?

A. The expense, as a rule, so far as my knowledge goes, is borne mutually between both parties.

Q. In buying and selling these imported ores how is the price fixed?

A. The price is fixed per unit of iron.

Mr. HALL: That is, I understand, your honor, that the unit means the per cent.; the merchants call it the unit in making an analyses.

Judge BUTLER: The percentage of ore?

Mr. HALL: Yes, sir; we have one hundred units, and 60% of metallic iron is called by these merchants 60 units. It is so much per cent. of metallic iron.

Q. How is the price fixed?

A. By the unit.

Q. Of what?

A. Of metallic iron; is shown by the analysis.

By the COURT:

36 Q. That means the pure iron?

A. Yes, sir; if it contains 50% of metallic iron we call it fifty units of irons and we pay ten cents a unit.

Q. Now, that excludes the water?

A. That excludes free water.

Q. Well, is there any other foreign substance in this ore except water?

A. Yes, sir. If you will permit me, I will commence at the commencement of a transaction.

Q. No; I do not want that. You can probably best inform us in this way: You say there are other foreign substances besides water?

A. Yes, sir.

Q. Well, is anything excluded from the calculation but the water? I thought you said the contract is for the percentage of pure iron.

A. Yes, sir; knowing all the other constituents of the ore, the value of a unit of iron is governed by the deleteriousness of other elements that may be with it.

Q. The water is excluded, but there are other foreign substances, impurities, also in the ore. Now, are they excluded also in ascertaining the percentage of iron?

A. No, sir.

37 Q. Then it is not pure iron, but it is iron and the other foreign substances or impurities, except water?

A. Yes, sir.

Mr. HALL: I understand that the other things are considered part of the ore. The water is not considered a part of the ore.

The COURT: The pure iron is not ore.

By Mr. HALL:

Q. The price is fixed, as I understand it, by the amount of metallic iron in the iron ore—so much a ton for the metallic iron in the iron ore?

A. Yes, sir.

Q. And what is the iron ore on which the metallic iron is calculated?

A. My definition of iron ore would be a natural product combined with the various other elements. Its commercial value is a source of iron.

Q. In the settlement of these purchases how is the weight of the iron ore which you pay for ascertained?

A. Paid by less the free moisture—the actual weight less the free moisture.

Q. That is, you pay for the number of tons of ore that there are after deducting this moisture?

A. Yes, sir.

38 Q. Was this mode of purchase and settlement a general custom of the trade in buying and selling imported iron ore in 1883?

A. Yes, sir; so far as my knowledge goes.

Q. And previous?

A. Yes, sir.

Q. If you went into the office of an iron-ore importer and were quoted a price on iron ore and nothing further was said, on what weight would you expect to pay?

The COURT: According to the custom of the trade.

A. I should expect to get the weight less the moisture—free moisture.

Q. Of course you understand that there is in some ores water which is chemically combined?

A. Yes, sir.

Q. But that you are not referring to?

A. No, sir.

By the COURT:

Q. Let me ask you a question just in that connection. On what would you expect to pay?

A. In asking that question it would be assumed that I would thoroughly understand commercially the kind of ore that I inquired for. If I did not there would be an exhaustive analysis presented which would be a standard.

39 Q. Upon what would you pay?

A. Upon that standard.

Q. Yes; but what is that standard, or what would it be? Of course, the water, you say, would be excluded.

A. Yes, sir.

Q. But on what would you pay?

A. If the standard showed that there was five per cent. of silica, we would not pay for that. If the ore upon receiving it showed there was ten per cent. of silica, we would not pay for that.

Q. How, if it showed other foreign substances?

A. If that was not in the standard we would not pay for it.

Q. If you were supposed to be familiar with the character of the iron, and you put your question just as the counsel has put it to the dealer, upon what would you, by the custom, be held liable to pay?

A. Really for the iron. If it contained silica, we both knowing the amount, we would pay for that; for sulphur, for lime, for platinum, if it contained that, and copper, if it contained that.

Q. And pay for it all at the same rate?

A. At the same rate.

Q. Supposing it contained sand?

A. In the standard, which is the same as silica, if it was contained in the silica, we would pay for that.

40 By the DISTRICT ATTORNEY:

Q. Pay for the weight of the sand?

A. Yes, sir.

Mr. HALL:

Q. I would ask you what this ore is used for.

A. Making pig-iron, smelting and blasting.

Q. What is pig-iron used for?
A. Making steel.
Q. By the Bessemer process?
A. Yes, and open hearth.
Q. State whether in the trade in buying and selling these imported ores this free water is considered a part of the ore.
A. It is not.

Cross-examination:

Q. Mr. Bent, have you ever dealt in domestic iron ore?
A. To a limited extent.
Q. To what extent?

The WITNESS: Within what time?
The DISTRICT ATTORNEY: Within the period about which you have been testifying.

A. Ten years. I should say perhaps three or four hundred thousands tons; perhaps more.
Q. Per annum or during the period?
41 A. During the period; perhaps five.
Q. Are you familiar with the hematite ores of the Northwest?
A. No, sir; I am not familiar with those.
Q. In what particular does the ore that you have been testifying about differ from the domestic ores with which you are familiar?
A. Well, a portion of them are the hard ores of the Lake Superior regions and the Minnesota regions. Many of them are almost identical with the hard ores imported.
Q. And what about the soft ores?
A. My experience with soft ores is very limited.
Q. Then the foreign ores about which you have been testifying are hard ores, are they?
A. No, sir. I mean to say the domestic Bessemer ores, such as we purchase. We do not purchase the ordinary hematite ores, which contain what we call red short ores.
Q. Are you interested in any foreign iron-ore mines?
A. Not personally.
Q. Is your company?
A. Yes, sir.
Q. What foreign mines?
A. In Cuba.
42 Q. How long have you been dealing in iron ore in the way in which you have testified?
A. 13 or 14 years.
Q. As I understand you, when you buy these foreign iron ores you buy them according to the units of metallic iron that they may contain?
A. Yes, sir; that is the standard.
Q. You pay for them by the weight, do you not?
A. Yes, sir.
Q. When they are transported from the port at which they arrive

to the point of consumption you pay by their gross weight, do you not? You pay the expense of transportation, the freight?

A. Yes, sir; well, we have bought them delivered in our yard.

Q. But when you buy them at the port of entry and they are carried on your account from the port of entry to the point of consumption you pay the charges far that transportation?

A. Yes, sir.

Q. According to the weight of the iron ore, do you not?

A. According to the weight of the material.

Q. And that material is as it is received over the side of the ship?

A. Yes, sir; that is correct.

43 The COURT: In other words, they pay for transporting water just as well as they pay for anything else?

The WITNESS: The same as we do in fuel and other things. We have to pay for the water transported in it, and snow.

Q. Whatever is a part of it, so to speak, you pay for?

A. No; what may be in the car.

Q. In the handling of that iron ore from the time that it is shipped on the other side until it is delivered to you at the point of consumption it is treated altogether according to its weight, is it not?

A. I could not tell you that, sir; I never imported any ore.

Q. From whom do you buy your ore?

A. Various parties.

Q. The plaintiff in this suit?

A. I have bought ore of him; yes, sir—that is, we have imported from our own mines, but we have never purchased ore and imported it.

Q. When your own ore is imported into this country from Cuba how is it treated? I mean in the description of it and in the payment of charges upon it.

A. We pay freight on the ton.

Q. According to the ton of iron ore?

A. According to the ton commercially.

44 Q. The commercial ton of 2,240 pounds?

A. Yes.

Q. It is described as iron ore in the bills of lading?

A. Yes.

Q. Both from Cuba and from the port of entry to Harrisburg?

A. Yes, sir.

Q. Are you familiar with the constituent parts of iron ore?

A. Commercially.

Q. What are they?

A. Well, there are not two ores, you might say—although they may be the same class of ores—that come from different mines that have the same constituency.

Q. Now, we will take up the iron ores you have been testifying about.

A. That is too general. It would take me a half a day to go through and remember the constituents of those ores.

Q. What do you call hydroscopic water in iron ore?

A. That is a chemical term. I do not call it a commercial term. My idea of it, though, is that it refers to free water.

Q. As I understand it—I want to be clear about it—water
45 in iron ore is found in mechanical combination with it and it is also in chemical combination with it, is it not?

A. Yes, sir; that is the way that I understand it—fixed and free.

Q. And in all the iron ores that you are familiar with there is a varying percentage of what is known as water in mechanical combination with the iron ore?

A. Yes, sir.

By the COURT:

Q. The question was whether or not it is true that in all iron ores, domestic and foreign, there is more or less water mechanically combined or free water.

A. Of course; my knowledge of all iron ores——

Q. Well, all that you know.

A. All that I know. I should say, in my judgment, there were.

By the DISTRICT ATTORNEY:

Q. Now, after the iron ore in which you deal is subjected to an analysis of samples taken from it, it is ascertained from that analysis that there is a certain percentage of metallic ore in that iron, is it not, and you then pay on that percentage of metallic iron; is that so?

46 A. That is the basis upon which the calculation is made.

Q. Is it not the fact that the higher the percentage of metallic iron in iron ore the higher price that iron ore brings: that is so as a matter of fact, is it not?

A. Yes, sir; at least I will put in this exception: If it carries with it a larger per cent. of deleterious material, then iron ore with 50 % for use may be worth more than the 70 per cent. ores.

Q. That depends upon the use you want to make of the ore?

A. That depends upon the deleterious substance that may be in it for the special purpose we want to use it for.

Q. Now, assuming as a matter of fact that there is a deduction of 10 % for moisture from an importation of iron ore, and that there is 60 % of metallic iron found in the importation and the contract price is ten cents per unit of iron, there being 900 tons left, that would net the seller $6 per ton, would it not, assuming that one thousand tons is dealt in, or $5,400?

A. If your figures are correct; that is the principle.

Q. The importation being 1,000 tons and without any examination for moisture, there is 54 per cent. of metallic iron in the
47 importation; at 10c. per unit of iron that makes $5.40 per ton, don't it?

A. I think so; yes, sir.

Q. The 1,000 tons, then, at $5.40 per ton, makes $5,400, don't it?

A. I think so.

Q. And that is the same that we figured out before?

A. Yes, sir.

Q. In other words, the only parties that are affected by this transaction, if I am correct in my arithmetic, is the United States Government; isn't that so?

A. I don't understand it so. I don't take them into account in making a trade for iron. If there is ten per cent. of free moisture in the iron it is deducted from the custom-house of weight, and we dan't pay for it.

The COURT: But you pay a percentage on the weight of iron alone deducted?

A. Yes, sir.

Q. You pay a bigger price for the iron ore if the percentage of metallic iron is larger, do you not?

A. Everything else being equal.

Q. Everything else being equal and without regard to any special use?

The COURT: Of course, because it is that much purer.

48 The DISTRICT ATTORNEY: There is no difference in the purity of the iron.

The COURT: Yes; it is that much purer of foreign substances.

Redirect examination:

Q. You have be-n asked about this foreign iron ore in which your company is interested. What kind of ore is that?

A. It is similar to the best of Lake Superior.

Q. I mean is it hard or soft.

A. Hard ore.

Q. Does it carry any moisture?

A. Practically, none; commercially, none.

JONES WISTER, commission merchant and dealer in iron materials of various kinds and steel, testified as follows:

Q. To what extent and how long have you dealt in or purchased imported ores?

A. For ores that I used, in the neighborhood of 20,000 to

49 25,000 tons. For ores that I bought later, double that amount or treble that amount.

Q. Do these ores contain moisture which is not chemically combined with the ore?

A. All ores contain moisture that is mechanically combined, as far as my knowledge goes of them.

Q. Do dealers in these imported ores consider this moisture which is not chemically combined a part of the ore?

A. They do not.

Q. In buying and selling these ores what standard, if any, is adopted in fixing the price, as regards moisture?

A. By the unit of iron.

Q. In what? In the dry or the wet ore?

A. In the samples of ore sent to the lab-ratory, which are dried at 212, the weight taken before, the weight taken after, and the free moisture deducted from it, set apart specially on the bill, and this is the amount the dealer sends his bill for and is paid for.

Q. That is, the price is fixed by the amount of the metal-ic iron in the ore—in the dry ore?

A. The metal-ic iron in the ore after it has been dried.

By the COURT:

50 Q. And that is so whether anything be said about the water between the dealers or not, is it?

A. That is the custom of the trade.

Q. Without anything being said about water?

A. It is usually said, but that is the custom.

Q. What is it that is usually said? In speaking of this ore, is not it the custom of excluding the water without there being any contract?

A. It has become the prevailing custom.

Q. To do what?

A. To exclude the water in making the bill.

Q. Without anything being said?

A. I don't think prudent dealers are apt to make contracts without speaking of it. It is mentioned in a casual way. This is understood, as a rule.

Q. But it is mentioned, you say?

A. Yes.

By Mr. HALL:

Q. As I understand it, it is the prevailing custom of the trade to exclude this water?

A. It is.

Q. If you went into the office of an importer of iron ore and were quoted the price, and nothing more was said, on what basis would you understand you were dealing—on a basis which excluded

51 the moisture or on a basis which included it?

The DISTRICT ATTORNEY: That is objected to. It seems to me that it is immaterial what this witness would do if he went into a broker's store.

The COURT: The question is in that form, but the question really is, What would the quotations be based upon, presented to a dealer calling for this character of foreign ore?

The DISTRICT ATTORNEY: I don't understand that this witness is able to speak of any universality of this custom at all.

The COURT: He has been dealing in it, and to the extent his knowledge goes his testimony is of little or much value.

Exception by the district attorney.

Q. If you went into the office of a dealer in imported iron ores and were quoted a price and nothing further was said, on what basis would you understand you were dealing in that ore?

The COURT: You or any other dealer.

Q. You or any other dealer. Would you understand that you were dealing in that ore with the moisture excluded or with the moisture there?

52 A. Foreign ore is always dealt in exclusive of the moisture.

The COURT: That might be, but it might be the result of a contract.

Mr. HALL: I submit that if every contract in foreign ore was made in that way that would be evidence of the usage.

The COURT: It would require the contract to refer to it.

Q. If you went into the office of an importer and were quoted a price for iron ore and nothing further was said, in the usages of the trade, on what basis would you understand you were dealing—on a basis from which the moisture was excluded or on a basis which included the moisture?

A. I would understand it to be a basis which excluded the free moisture.

Cross-examination:

Q. You have bought and sold these foreign ores, I understand you to say?

A. To a limited extent.

Q. To what extent is that—a limited extent?

53 A. Well, I stated from 20,000 to 25,000 tons for my own use and double that amount, or perhaps treble that amount, for the use of other people.

Q. What number of transactions did that cover—separate transactions?

A. It covered every cargo. Every cargo is a separate transaction, so far as a contract goes.

Q. And about how many cargoes were there?

A. That I don't know, because I don't recollect. There were some as small as 300 or 400 tons, and some as large as a couple of thousand.

Q. About how many cargoes?

A. Fifteen or twenty.

Q. Each of these cargoes was made a separate contract and a separate transaction of sale?

A. A separate transaction, not a contract.

Q. How many transactions were these?

A. I don't know.

Q. About how many?

A. I should say twenty.

Q. About twenty?

A. Certainly it was twenty; perhaps more.

Q. And, concerning these twenty distinct transactions, there was separate and distinct contracts; isn't that so?

54 A. That is not so.

Q. Have you not said that although the custom of the trade here is that this should be exclusive of moisture, that it is usually said that it should be exclusive of moisture in these transactions?

A. That was made on the original contract.

Q. Why was it made at all if it was the custom of the trade?

A. Because prudent men generally make a contract.

Q. In other words, it would not be a compulsory stipulation of that contract except it was said so; isn't that so? Is it not so that if you in your special contracts did not say that this moisture should be excluded, or in your written contracts it was so expressly stipulated that this moisture should be excluded, wouldn't it be a thing which would be voluntary with the purchaser as to whether he should so consider this iron ore exclusive of moisture?

A. It had become the custom when I began to deal.

Q. If you will permit me——

The COURT: What was the date of that when you began?

The WITNESS: 1878, 1879, and 1880—along there.

The DISTRICT ATTORNEY: The witness has said that it was
55 usually said in making these contracts for the sale of foreign ore that there should be this allowance.

The COURT: I heard that. What was your question?

The DISTRICT ATTORNEY: I asked him whether it was not so that if this contract did not say so, as to the exclusion of moisture, that it would be a voluntary matter with the purchaser whether he so called the deduction for moisture.

The WITNESS: I say it would not. I say the custom would govern it.

Q. Will you be kind enough to say why it is that there is this express condition in these contracts? What is the use of putting it there?

A. I don't say that it is put in the contracts. I don't know that it is put in the contract to-day.

The COURT: What the witness said was that a prudent man would generally do so.

The DISTRICT ATTORNEY: And the witness said in his examination-in-chief that it was usually said so in these contracts.

The COURT: What he said was that a prudent man would do so.

Q. Will you be kind enough to explain why it is that this special stipulation is put in these contracts?

56 The COURT: Did you say a special stipulation was put in the contracts?

The WITNESS: I did not. He is trying to get me to say that.

The COURT: The questions are asked in a form which tends to excite the witness. The counsel has assumed that the witness's answer went further than it did. The witness said a prudent man would usually mention it, would usually refer to it. Counsel has called that a stipulation. The witness has not said that. You must not put his answer in some other form, which implies more than what was said. It provokes. It does not tend to get out the deliberate truth; it provokes.

Q. I understand you have said that as to this number of separate contracts that you have made in the purchase and sale of ores. Will you kindly say just what proportion of those were written or printed contracts.

A. Well, it is the custom of the trade to make what we call a double-sale note, a double-sale contract; one goes to one man and one to the other. They return them if not satisfactory and they arrange them between themselves. You ask me how many of those sale contracts I have made.

Q. I ask you as to what proportion of the purchases made by you were covered by written or printed contracts.

57 A. It is the custom, as far as I know. They were all made with a written contract.

Q. All covered by a written contract?

A. All covered by a written contract.

Q. Do not those contracts contain a stipulation that there shall be this allowance made for the presence of water or moisture?

A. They do, usually.

CHARLES B. HOUSTON, treasurer of the Chester rolling mills, at South Chester, Pennsylvania, testified:

Q. To what extent and how long have you purchased imported iron ore?

A. Possibly six to seven years and probably from 200,000 to 300,000 tons.

Q. Do dealers in these imported ores understand, in buying and selling, that water, which is mechanically present and not chemically combined, is a part of the ore?

The DISTRICT ATTORNEY: I think the form in which my friend puts the question is quite objectionable.

The COURT: It is slightly objectionable in form, but with the class of witnesses here it cannot be very important; nevertheless, if it is objected to——

58 The DISTRICT ATTORNEY: I don't object to it as being leading in form, but it appeared to me that that was not exactly the way to meet this case, to bring out the personal understanding of the witness.

The COURT: His understanding of the custom.

The DISTRICT ATTORNEY: I think it would be perfectly proper, if your honor considers that the inquiry is material, to ask him what the custom was.

The COURT: If the question does not imply that, then it would be short of the purpose. But I understand the question to be not with reference to his custom. Just repeat your question, Mr. Hall.

Q. Do dealers in imported iron ore, in buying and selling this iron ore, treat water, which is mechanically present and not chemically combined with the ore, as a part of the ore?

The COURT: I think that question is legitimate. Of course, it refers to dealing generally. (To the witness:) You can answer the question.

The WITNESS: They do not consider the water a part of the ore.

Q. You do not treat the water as a part of the ore, and, so
59 far as you know, that is the universal custom of the trade?

A. That is the universal custom of the trade, so far as I know.

Q. And this was the custom in 1883?

A. Yes, sir.

Q. I will ask you, if you went into the office of a dealer in imported ore and were quoted a price and nothing further was said, on what basis would you understand that you and he were dealing—on the basis of the ore from which the moisture had been excluded or on the basis of the ore with the moisture in it?

A. We would understand it—at least I would understand it——

The COURT: The question is, How would the trade understand it, from your knowledge of it?

The WITNESS: My knowledge of the trade would be that they would understand it to the exclusion of the water that is in the ore, if nothing was said.

Q. Have you made many transactions of this sort where nothing was said?

A. I have made transactions of that kind.

Cross-examination:

60 Q. Mr. Houston, how many transactions within the last three or four years have you made in foreign ores?

A. Separate transactions?

Q. Yes, sir; about. I don't, of course, expect you to state them accurately.

A. I could not give them accurately. I have made transactions for our company which would include cargoes, say, less than 1,000 tons up to as much as 10,000 or 15,000 tons in one transaction.

Q. Who do you buy from?

A. Well, we buy from several—mostly from Earnshaws and Naylor & Co.

Q. The plaintiffs in this suit?

A. I presume they are.

Q. You don't import directly yourself?

A. We import no ores directly.

Q. When you make these transactions in foreign iron ore are they made by word of mouth or is a sale note or contract of sale made between the buyer and the seller?

A. The contract is made verbally first and then it is afterwards written and signed by each party.

Q. And that is the universal custom between the dealers?

A. That is the general custom; I don't say the universal custom.

Q. That is the general custom between the buyer and seller?
61 A. Yes, sir.

Q. And in these written contracts that you speak of there is always, I believe, a provision for the allowance for moisture, is there not?

A. That is usually so, and I think probably always. The forms are generally in type, to be filled out in accordance with the agreement.

ISAAC FEGLY, president of the Warwick Iron Company, Pottstown, testifies as follows:

Q. To what extent have you dealt in imported ores?
A. I commenced dealing in imported ore in 1879.
Q. To what extent have you dealt in it?
A. I suppose since that time we have used from one hundred to one hundred and fifty thousand tons.
Q. Do dealers in imported ore, in buying and selling these ores where there is water mechanically present and not chemically combined—do they treat this water which is not chemically combined, but merely mechanically present, as a part of the ore?
A. I have never done so.
Q. That is, it is the custom of the trade?
62 A. Yes, sir.
Q. Not to so treat it?
A. Yes, sir.
Q. And this was the custom in 1883?
A. Yes, sir.
Q. And previous?
A. And previous; yes, sir.
Q. If you went into the office of an iron-ore importer to buy iron ore and a price was quoted to you, on what basis would you understand you two men were dealing—on a basis from which this accidental moisture was excluded or on a basis which included it?
A. I always understood it that it was the basis dried at 212.
Q. What is the effect on the metalurgical value of the ore of this moisture? Does it increase or diminish it?
A. Diminish it.

Cross-examination:

Q. When you say that the custom of the trade never is to treat this iron ore as though it had water in it, of course when you pay freights on this material you then treat it as you then pay freight on the water, do you not?
63 A. In the shipment by rail from Philadelphia to my destination we have to take the weight or whatever is weighed to us.
Q. And you treat the water there in the frieght?
A. Yes; in the freight.
Q. You treat this material as iron ore in the way that you use it, I presume, in your furnaces. Is not that so?
A. No, sir; we make allowance in the price of the iron when we charge the furnace. Suppose there is 7 % of water, we expect to get 7 % less yield of that ore.
Q. That is, in your arithmetical calculations as to the outcome of using this ore?
A. Yes.

Q. Are these contracts that you make for the purchase of the imported ore written or are they printed or are they verbal contracts?

A. I have had some written and some just by correspondence—letters.

Q. Now, in the written contracts there is a stipulation that there shall be the allowance made for moisture, is there not?

A. Yes, sir.

Q. That is universally so?

A. Universally so; yes, sir.

64 Q. Then in the payment for these there is, of course, the simple drying of the sample of this iron ore?

A. Yes.

Q. The cargo of iron ore is not dried first at 212 at all.

A. No, sir.

Q. And the actual moisture, whatever it is, is deducted from the weight?

A. Yes; because the moisture varies very much.

Recross-examination:

Q. If you bought a thousand tons of iron ore you would not expect to get a thousand tons of dry iron ore, would you?

A. Well, in some cases I have had it run as low as 1½ per cent. and as high as 8 per cent.

Q. When you get the thousand tons of iron ore delivered to you it would not be dried at 212?

A. I wouldn't buy it any other way.

Q. Suppose you buy a thousand tons of foreign iron ore, it would come to you wet, wouldn't it?

A. Certainly.

Q. And you wouldn't refuse it because it was wet, would you?

A. Oh, no.

65 Q. You would not expect to get a thousand tons of dry iron ore?

A. No, sir; whatever the moisture, would be less.

By Mr. HALL:

Q. But what you would pay for would be the tons of dry iron ore?

A. Yes, sir.

WILLIAM W. THURSTON, the president of the Bethlehem iron works, at South Bethlehem, Pa., employing about 3,000 men, testified as follows:

Q. To what extent and how long have you purchased imported iron ore?

A. Regularly since 1883; about one million five hundred thousand tons.

Q. Did you make purchases before that time?

A. There may have been purchases made, but I was not in the management of the company prior to that and am unable to state.

Q. In buying and selling these imported ores do dealers treat the water which is merely mechanically present and not chemically combined as a part of the ore?

A. No.

66 Q. On what basis do you understand it is the custom of the trade to deal in buying and selling imported ore?

A. We buy the ore dried at 212 degrees Fahrenheit. The metallic ore is taken, and we pay so much per unit on that.

Q. The dried ore?

A. I was going to say. Then the actual weight on the scales of the ore is taken, and from that the percentage of moisture, also determined by chemical analysis, is deducted, and we pay for the weight of the dried at 212 degrees Fahrenheit.

Q. That is, it is the custom-house weight, less the moisture?

A. Yes, sir.

Q. And this you understand to be the universal custom of the trade?

A. Not absolutely universal. In one instance we have purchased foreign ore where it was not done, where it was an exception.

Q. What is that exception?

A. In the case of Hodbarrow ore.

Q. And why do you consider it an exception?

A. Because it is the only foreign ore that we have purchased in that way, except in the way I have stated before.

67 Q. Why is this exception made in regard to Hodbarrow ore?

A. It is made in regard to Hodbarrow ore because it is an ore of exceptionally good quality. It is an ore that contains a certain percentage of metallic iron, and the parties selling it refuse to sell it in any way except at a price per ton. In our own minds in making up what we consider to be the value of the ore we went through the calculation in our office of taking the moisture and seeing what we could pay for the ore just exactly as it could be done on the bills, only in this instance it was a mental matter and not a matter that appeared on the contract.

Q. So that your testimony is that it is the universal custom of the trade, with the one exception of the Hodbarrow mine which you have stated, in dealing in imported ores to deal on the basis or standard of the ore dried at 212 degrees Fahrenheit?

A. That is what I said.

Q. Will you state approximately, if you know, what relation the amount of this Hodbarrow kind which is imported bears to the whole amount of other kinds of imported ores that come into the country?

A. Oh, that would be impossible for me to do.

68 Q. Just roughly. Is it a large amount or a small amount?

A. Well, I should say it was rather a small amount.

Cross-examination:

Q. Probably with some other?

A. Probably with some other.

Q. Your company is the owner of foreign mines, is it not?

A. Yes; in Cuba.

Q. As a matter of fact, Mr. Thurston, when these transactions are made in foreign ore are they the subject of a written or printed contract or not?

A. They are generally; not always.

Q. Almost altogether?

A. Not always.

Q. I say nearly altogether?

A. Generally; yes, sir.

Q. And assuming that a thousand tons is the subject of the transaction, the contract provides for the purchase of a thousand tons of iron ore, does it not?

A. That is what the contract calls for, dried at 212 degrees Fahrenheit.

Q. One moment. I will come to that in a moment. The
69 contract provides for the purchase of one thousand tons of iron ore from your concern, for instance, with the seller, and that one thousand tons of iron ore is delivered to your firm.

A. I don't understand that. You said delivered to our concern as seller.

Q. I mean as purchaser.

A. They deliver the ore, more or less, as a thousand tons. It is never accurate.

Q. I am not speaking of that. Of course there may be some less of weight by the carriage, but when you buy the iron ore from the seller you buy one thousand tons of iron ore, do you not?

A. I buy *by* one thousand tons of what I call iron ore, generally, when I buy it.

Q. The contract provides for the sale of one thousand tons of iron ore?

A. Yes, sir.

Q. And there is delivered at your furnace one thousand tons of iron ore, is there not?

A. Yes, sir.

Q. And then you pay for it to the seller according to the units of iron ore?

A. Determined according to the specifications of the contract.

Q Varying according to the specifications of the con-
70 tract?

A. Yes, sir.

Q. Which provides for an allowance for moisture?

A. Which provides for an allowance for moisture.

Q. But the whole transaction is the one thousand tons, is it not?

A. Of dry ore. I expect to buy one thousand tons of dry ore.

Q. Let us see whether it is or not. Your contract provides for the purchase of one thousand tons of iron ore, does it?

A. Subject to certain conditions.

Q. That is in reference to the payment?

A. I beg your pardon; it is quite as much in reference to the

quantity. It is distinctly stated how the quantity is to be determined.

Q. Quantity of what?

A. Of ore.

Q. Quantity of iron ore?

A. Quantity of iron ore. It distinctly states how much there is. For instance, twenty thousand tons of iron ore. I have a right to expect twenty thousand tons of iron ore delivered to me with the percentage of moisture deducted.

71 Q. So that I understand there is to be a deduction allowed on account of moisture?

A. No; I am to have the gross twenty thousand tons after that is deducted.

Q. In some instances, if there was a variation of 20 % on account of moisture, where you buy twenty thousand tons you might get twenty-two thousand?

A. That is generally provided for by saying "more or less"—twenty thousand tons, more or less.

Q. Is that a fact or not?

A. Yes.

Q. That is to say, that if you buy twenty thousand tons of iron ore by reasons of the provisions in this contract there would be delivered to you twenty-two thousand?

A. We would not be obliged to take the twenty-two hundred extra if the contract called for the specific twenty thousand.

Q. Then you would only have to take twenty thousand?

A. Yes; what we bought.

Q. Then you would have to pay for the ascertained value?

A. We would pay for it according to the contract.

Q. When the iron ore is delivered at your furnace is it delivered in a dry or wet condition?

A. Delivered in whatever condition it comes.

Q. That coming over the ship's side?

A. Over the ship's side. It may be dry on the way and

72 it may be rained on on the way.

Q. That is what I say. If it stands in the sun for two or three days it gets more or less dry?

A. Certainly.

Redirect examination:

Q. Do I understand that if you have a contract for twenty thousand tons of ore you understand that there should be delivered to you, in compliance with that contract, twenty thousand tons of ore dried at 212 degrees Fahrenheit?

A. I do.

The COURT: But I understand the witness to say that to enable him to get the iron ore the matter transferred to him by railroad may amount in weight to a very considerably greater sum.

Mr. HALL: Certainly; that is what I mean.

Q. That is, there might be on twenty thousand tons of the dry

iron ore which was delivered to you in compliance with that contract twenty-two thousand tons of actual material on which you had to pay the freight?

A. Yes, sir.

73 Mr. HOUSTON recalled.

By Mr. HALL:

Q. Among importers and dealers in iron ore what do you understand the iron ore of commerce to be?

A. I would understand it to be the ore after the water is excluded.

Judge BUTLER: You say you would understand it so?

The WITNESS: That is understood in foreign ores.

Q. The iron ore of commerce is understood to be the iron ore from which the water has been excluded?

A. That is the general custom.

Judge BUTLER: Is it or not a fact that in a written contract entered into there is a stipulation on the subject of water?

The WITNESS: There is.

Q. You have bought ore without such stipulation being put in writing?

A. In writing. I have made contracts, but I would not say that stipulation was not in a written contract. I cannot recollect that it was not, although I have bought it for our company without stipulating at all that the water should be excluded, understanding that it would be.

74 Q. The contract which you refer to is really a memorandum of the whole transaction, covering all the details as to the payment, delivery, and everything in regard to the sale of the ore, is it not?

A. I should understand it to be so—a memorandum of contract.

Q. And that this stipulation as to the moisture and the deduction made in the weight is no stipulation in the contract?

A. Not any more than any of the other stipulations.

By the DISTRICT ATTORNEY:

Q. But it is a stipulation?

A. It is a stipulation.

Q. And it relates to the allowance for moisture, does it not?

A. It is stated in that way.

Q. Stated in what way?

A. That the moisture shall be deducted.

Mr. HALL:

Q. And the form of contract has remained practically unchanged ever since you have had any dealings in the ore?

A. I think so.

75 ALFRED EARNSHAW, brother of the plaintiff and an importer of iron ore, testified as follows:

Q. To what extent and how long have you imported iron ore?

A. Since 1875.

Q. And to what extent?

A. One-third of the whole business done in the country.

Q. What is the term iron ore understood to mean commercially among importers and dealers in imported ore; or, in other words, what is the iron ore of commerce?

A. It is undoubtedly iron ore dried at 212 degrees Fahrenheit.

The COURT: The iron ore of commerce, did you say?

The WITNESS: Yes, sir.

Q. Will you please explain to the court and jury what the custom of trade is in buying and selling these imported ores so far as it relates to the ascertainment of this moisture and any deduction made therefrom? State generally the custom of the trade how contracts of this sort are entered into.

A. The custom of the trade is that the metallic iron in the ore dried at 212 is ascertained by the chemist. The ore is usually sold at so much per unit, and when invoiced the water, free water,
76 is deducted from the custom-house weight.

Q. And this is the universal custom of the trade in making such contracts?

A. Practically it is.

Q. When you say practically what do you mean?

A. I mean that there are such things as odd exceptions that do not interfere with the custom of the trade, but that do not make it absolutely universal.

Q. For instance, what percentage of the whole amount of iron ore imported, in your judgment, is bought and sold in this way?

A. 98 or 99%.

Q. What I want to bring out particularly is, When a customer comes into your office and the preliminaries of the contract are entered into and the buying and selling of the iron takes place is anything said, usually, about the moisture, or is that taken to be understood?

A. As a rule, nothing is said at all. When a customer comes into the office he generally asks the price, states the time of delivery, names the kind of ore that he wishes to buy, and if we can agree upon those terms the transaction is settled. Probably in most cases a memorandum in the form of a letter is just written confirming that and saying all other terms as usual, and the formal con-
77 tract is then made out and forwarded for the signature. It may be three or four days; it may be a week; it may be a month; I have known cases where it has been three months after the contract had been completed before the contract was signed.

Q. So that in conducting the preliminaries of the trade and completing the bargain, as you say, it is sometimes put in the form of a letter, and in that it is usually stipulated to be in accordance with the usual conditions, and nothing is said about moisture?

A. No; never mentioned under those circumstances.

Q. And that you understand is the universal usage of the trade in buying and selling those ores?

A. Yes; I think undoubtedly so.

The COURT: You said universally. That means without exception.

The WITNESS: Say 98 to 99% of the whole trade is done that way.

Q. Have you ever been at the mines in Spain, in Balboa, where the ore that is the subject of one of these suits is mined?

A. I have never been in Balboa, but I think you are mistaken about where the ore in suit is from. It is from Porman. Yes; I have been there several times, and examined the mines.

78 Q. What is the state of the ore as it lies at the pit's mouth?

A. There is no pit at all there for this ore that forms the subject of this suit. It is mined on the top of a ridge of a very high range of hills. It runs about 1,400 feet high. It is mined practically on the top of these hills, exposed to the rays of the run. Practically there is no pit at all, or galleries, or anything of that kind. It is more open quarrying.

Q. And what is the condition of this ore as regards moisture?

A. Whenever I was there, and I have been there four times, it was always fairly dry weather, and the ore was as dry as dust.

Cross-examination:

Q. You have had a good deal of experience in relation to foreign ores, have you not?

A. Yes.

Q. Of various kinds?

A. Yes, sir.

Q. There is no doubt, as a matter of fact, that the quantities of moisture that they hold in mechanical combination vary according to the place of production?

A. Not absolutely that. I may say they vary from a

79 quarter of one per cent. to twenty-five per cent. That has been my own experience.

Q. That is, the foreign ores do?

A. Yes.

Q. Have you any experience in domestic ores?

A. Very little. I have had some.

Q. Is your experience large enough to enable you to say whether there is not also a variation in them as to the quantity of water that they hold in mechanical combination?

A. I should say, undoubtedly, there is; but in a minor degree than with the foreign ore.

Q. That is to say, there is less percentage of water than in the foreign ores; is that what you mean?

A. I should say less percentage than in the foreign ores.

Q. Less percentage than in the foreign ores?

A. Yes, sir.

Q. The contracts that you make with your purchasers in which the iron ore that you sell is mainly confined to foreign ore are printed contracts, are they not?

A. Yes; they are.

Q. And have been how long?

80 A. They used to be written years ago, and it got to be *to be* such a trouble, and the terms were always the same, that we finally adopted always having them printed.

Q. Well, how long have they been printed?

A. Probably since 1880.

Q. And since that time your contracts of sale have always contained a stipulation that iron shall be sold according to the metallic unit of iron in the ton of 2,240 pounds; is not that so?

A. Yes; I think you may say so.

Q. So that in every sale that you make you make a stipulation of that kind with your customers?

A. Practically; yes, sir.

Q. That is the way, is it?

A. Yes; that is the way.

Q. Let me ask you whether this is the form of the stipulation that is contained in the contract which you make with the purchaser: "That each cargo is to be sampled on arrival and tested by Booth, Garrett, and Blair for metallic iron and moisture in sample dried at 212 degrees, such determination to be final, half the cost of sampling and analysing to be borne by each buyer and seller." Is not that the stipulation that you make with the purchaser?

A. Yes; that is practically the form in which it runs.

81 Q. Well, I suppose, as a matter of fact, that the value of these foreign ores varies according to the amount of moisture contained in them, don't they?

A. No; they don't.

Q. What causes the variation in price?

A. The percentage of metallic iron and the freedom from impurities. You see, as the ore is sold on the unit, dried at 212, the element of moisture does not enter into the price, unless, of course, it were an exceedingly wet ore, where it would be absolutely injurious for use in the furnace, and then, of course, it would make a material difference in the price.

Q. It wouldn't make any material difference in the price if you sold after it was——

A. They would simply refuse to receive it. Then it would not be fit to put in the furnace.

Q. Yes; but as I understand you and as I understand the provision in you- contract that you make, the whole cargo is not subjected to that test and received in that way after such subjection by the purchaser, but it is only a sample that you furnish that is analysed. Is not that so?

A. I have given a great deal of attention to the subject of the sample to find whether a sample was a legitimate representation of the cargo, and I must confess that there is no question that

82 the samples that are taken by the sampler are legitimate representation of the cargo.

Q. I suppose that might or might not be according to circumstances; but that is not my question.

A. No; but I say that it is so.

Q. My question was this, that the article that is delivered to the purchaser is the ton of 2,240 pounds; is not that so?

A. No, sir; the article that is delivered to the purchaser is dried at 212—that is, 2,240 pounds less the moisture.

Q. Now, I want to be sure that I am right. Is it not so that when you sell one thousand tons of iron ore you deliver one thousand tons of iron ore?

A. No, sir; I have known, after a heavy snow-storm, when it arrived there weighing, say, 1,100 pounds. I have known it to lie out in the sun and arrive there, say, 900 pounds. It depends entirely upon the weather to which it is subjected.

Q. Well, that is allowed for—that is, there may — a variation of 5 or 6 %?

A. Then the hypothetical weight. When I sell a man a hundred thousand tons of iron ore that hundred thousand tons of iron ore is on the net weight—the custom-house weight less the moisture. So that I deliver, it may be, one hundred and five thousand

83 tons nominally.

Q. You also guarantee in the sale of your iron that it shall not contain more than a certain percentage of phosphorus, do you not?

A. Generally.

Q. Isn't it the fact that that stipulation is in all your contracts?

A. Oh, I do know some of the ores *as* — well known that it is not put in.

Q. Such ores as what?

A. Elba, Marbello, Alveto, Campanile, all the English Cumberland hematites, and Irish ore.

Q. Is it not a fact that in your contracts when you stipulate for the price that you provide it to be so many cents per unit of metallic iron per ton of 2,240 lbs.?

A. No; I think the clause says that the weight is to be custom-house weight, less the moisture.

Q. I am now speaking of the price, whether that stipulation is not contained in the contracts that you make. Do you not expressly provide that the price is to be blank cents per unit of metallic iron per ton of 2,240?

A. I cannot call to mind whether that is the exact wording or not, but it is so many cents per metallic unit per ton.

84 Q. Of what?

A. I don't know whether 2,240 lbs. is the contract or not.

Q. Could it be less?

A. I am simply saying that I don't know whether the figures are used or not.

Q. But you remember sufficiently of the forms of your contract; you have made a great many. Do you mean to tell me that is not so?

A. I don't think I have had one of those contracts for five years.

Q. I mean it is in your line as to what you stipulate for.

A. I told you it is per ton. I don't know whether these figures are there or not. I think the wording is simply per ton.

Q. (Submitting a paper.) Now, will you look at one of your blank contracts and refresh your memory?

A. Why, certainly; I can tell you in a moment if I see it. (After looking at paper:) Yes; it is 2,240 lbs. I did not know that the figures were there.

Redirect examination:

Q. And the ton of 2,240 lbs. is of the dried ore?

A. Yes, sir.

85 WILLIAM W. THURSTON recalled.

By Mr. HALL:

Q. Mr. Thurston, what is the term iron ore understood to mean commercially among importers and dealers in imported ore, or, in other words, what is the iron ore of commerce understood to be by them?

A. The ton of ore dried at 212 degrees by analysis is ascertained to contain a certain percentage of metal dried at 212 degrees.

Q. That is, the iron ore of commerce, as understood by importers and dealers in imported ore, is iron ore dried at 212 degrees?

A. Yes, sir. I want to make a correction. In saying Hodbarrow here this morning I was alluding rather to the individual who sold. I want to include also Alamera, another ore sold by the same man. It is a very small quantity. It was both Hodbarrow and Almera that I bought from that one party.

LUTHER S. BENT recalled.

By Mr. HALL:

86 Q. What is the term iron ore understood to mean commercially, among importers and dealers in imported ore, or what is the iron of commerce understood to be by them?

The WITNESS: Relating to moisture?

Q. What is understood to be the iron ore of commerce in relation to moisture?

A. As far as my knowledge and experience goes, it is dried at 212 and the moisture deducted.

Q. Then you understand that the iron ore of commerce—what is commercially understood to be iron ore among importers and traders—is iron ore dried at 212 degrees?

A. Yes, sir.

Q. And if you were talking with the dealers about so many tons of iron ore you would mean iron ore from which the moisture has been deducted?

A. Yes, sir.

Q. That is the universal understanding, as you understand it?

A. As far as I know, sir.

Cross-examination:

Q. Now, do I understand you to say, because the question was put in that form, that the iron ore of commerce is iron dried at 212 degrees Fahrenheit?

A. So far as my experience has been with imported ore.

87 Q. Your experience, then, only related to imported ores?

A. That is the question, I believe.

—. No, sir; I beg your pardon; that is the way you answered.

The COURT: Were you speaking of imported ores alone?

The WITNESS: I was, sir. I understood the question so.

Q. How is the ore delivered to you, wet or dry?

A. Delivered as it comes out of the ship. That is why we receive it alongside the ship.

Redirect examination:

Q. If you contracted to have a thousand tons of iron ore delivered to you, would you understand that a thousand tons of dry ore or a thousand tons of wet ore would be a compliance with that contract?

The DISTRICT ATTORNEY: Is that a question?

The COURT: No; what he would understand I think is not admissible.

Mr. HALL: Well, I would amend the question by saying what he would understand to be——

The COURT (interposing): What would be the trade understanding?

Q. What would be the trade understanding?

A. So far as my knowledge goes, they would expect a thousand tons less the moisture.

88 By the DISTRICT ATTORNEY:

Q. And that, I presume, because of the contract between them and the seller?

A. Of course, it would be a contract.

By the COURT:

Q. Suppose there was nothing in the contract relating to the subject?

A. I should claim it, sir, and in my judgment I would be right in claiming it, by custom.

The plaintiff here rested his case.

89 The U. S. district attorney then opens for the defense, and introduced the following testimony:

WILLIAM D. REES, of Cleveland, Ohio, the secretary and treasurer of the Republic Iron Ore Company of Michigan, producing about 225,000 tons a year, testified:

Q. Will you please state just how long you have had knowledge of the iron business?

A. In connection with that company, about twelve years.

Q. In connection with that company about 12 years, and before that?

A. In other capacities before that.

Q. Do you know that there is such a commodity as iron ore?

A. Yes, sir.

Q. What do you understand iron to mean in the trade?

Objected to by plaintiffs, and objection sustained.

DISTRICT ATTORNEY: It is offered to show by this witness and other witnesses from districts of the United States, including the New England district, the Eastern and Lake Champlain district, the Southern district, the Southwest and Lake Superior districts,
90 where iron ore is produced, as respects domestic ores, that in this country the meaning of the term "iron ore" in commerce or trade is the natural substance from the iron mine in its crude state, irrespective of the presence or absence of moisture or water.

Mr. HALL: That is objected to.

Judge BUTLER: The objection is sustained.

Evidence was then introduced tending to show that in handling imported ore no deduction of the charges for handling these ores is made on account of water contained in them, and that in transportation by rail or water no deduction from the freight is made by the carrier on account of water contained in them.

JOSEPH D. WEEKS:

Q. What position do you hold?

A. I am editor of the American Manufacture-, Pittsburgh.

Q. Have you been connected with any other iron journals?

A. Yes, sir; I was editor of the Iron Age for ten years.

Q. Do you hold any other position?

A. I am secretary of the Western Pig-Iron Association of Pittsburgh and an expert of the United States Geological Survey.

91 Q. You have had considerable experience in regard to iron ore, have you not?

A. Yes, sir, as my position in connection with my paper has required me to become familiar with the custom of the country—buying and selling ores.

Q. Foreign and domestic?

A. Foreign and domestic, in order to make my reports.

Q. Have you made any investigation into the subject as to how foreign ores have been bought and sold within the last five years; and, if so, what is the result of those investigations?

—. ——.

Q. You are a mining engineer, are you not?

A. Yes, sir; I have been president of the American Institute of Mining Engineers.

Q. And you are also a chemist?

A. I am a chemist, although I have not done anything, practically, in ten or twenty years.

Q. Have your investigations led you to examine personally the foreign mines?

A. Some of them; yes, sir.

Q. What mines?

A. The mines on the west coast of England, the Ironstone mines in Cleveland, England; the mines in Nova Scotia; that is
92 about the extent, and possibly some in Scotland.

Q. You are familiar, then, to some extent with foreign ores?

A. Yes, sir.

Q. Will you please state what is the method of dealing in foreign ores? I don't mean any particular kind of foreign ores, but foreign ores generally.

A. The method on the part of some sellers here is to sell them with an allowance for water; the custom on the part of other sellers is not.

Q. What sellers that you know of sell it with a stipulation for the allowance of water?

A. As I understand, Naylor & Co. and Earnshaw.

Q. These two plaintiffs?

A. Yes, sir.

Q. Do you know of any other sellers that do it in that way?

A. Not that I recall now, as a universal habit.

Q. They may do it occasionally?

A. They may do it occasionally.

Q. Well, how is it generally sold—the foreign ore?

A. These two parties uniformally sell it with an allowance for moisture; the other parties do not. For instance, Latassa & Co., who are now out of business. I have seen contracts of theirs without an allowance for moisture.

Q. Within what period?

93 A. Since 1881 or 1882, 1883, 1884 I have seen contracts, and W. R.—I think the initials are—Marvel, and, I think, Mr. Read, who is now out of business. I have seen contracts of all of those parties without an allowance for moisture.

Q. Within what period?

A. Since 1881.

Q. To what time?

A. Down to the past three years. I don't think I have seen any formal contracts within three years. I have seen contracts for ores that I recall. I have seen contracts for Marbello ore and, I think, some years ago some contracts for Porman.

Q. And these are all imported ores?

A. Yes, sir.

Q. Will you please tell me what you understand to be the definition of iron ore?

A. I understand iron ore to be the mineral iron ore in its natural or crude condition, as it comes from the mines, properly cobbed or selected for shipment from the mines.

Q. Do you know of any difference in that definition as applied to foreign ores as distinguished from domestic ores?

A. Only for the simple purpose of settlement or prices.

94 If I was to go into a place and see these different kinds of ores and I was to ask what that is and what this is they would say that it is ore.

Q. I asked you whether there is any distinction between your definition of iron ore as applied to foreign ore, as distinguished from domestic ore—any difference in the definition?

A. Nothing in the definition. There may be some difference in the question of settlement between either buyer or seller.

Q. But you understand that that method of settlement as to the terms is particularly applicable to the two parties to this suit?

A. Yes, sir.

Judge BUTLER: He might tell us what he knows of foreign ores—that is, the different discription of foreign ores—showing, if it be so, that there is a variation in the quantity of water held in combination.

Q. Foreign iron ores vary in their con-tituent parts, do they not?

A. Yes, sir.

Q. And do the domestic ores?

Objected to by plaintiff. Objection overruled. Plaintiff excepted.

A. Yes, sir.

95 Q. Now, in what particular do foreign ores vary from each other, first?

A. They vary from each other first in the physical characteristics, just the same as American ore does. Iron ore may be hard or soft. Those are the two general characteristics. I don't know of such a thing as a porous ore or a spongy ore. I know these soft, fine ores, and they will absorb in the spaces between the particles water, but I don't understand them to be spongy or porous. I understand a pore to be a thing that is a part of a constituent of a thing, the same as the skin. I understand spongy to be like a sponge. I don't know of any of such ores. There may be occasionally an ore on the surface exposed to the weather where certain of the softer constituents have been taken out.

Q. Such as the clay and sand?

A. Such as the clay and the sand; but I don't know of ores that could be properly termed porous ores or spongy ores. Then the ores may be of different characteristics as to their quality—that is, one may have more or less of iron or silica than another, or oxygen, alumina, phorphorus, sulphur, water.

Q. In answer to a suggestion of the court, you were describ-

96 ing the differences between foreign and domestic ores. You had got as far as describing the differences between the foreign ores. Your last testimony was this:

"Q. Foreign iron ores vary in their constituent parts, do they not?

A. Yes, sir.

Q. And do the domestic ores?

A. Yes, sir.

Q. Now, in what particular do foreign ores vary from each other, first?

A. They vary from each other first in the physical characteristics, just the same as American ore does. Iron ore may be hard or soft. Those are the two general characteristics. I don't know"——

Mr. HALL: I would like to have an exception noted as to the inquiry in regard to domestic ores.

The COURT: It can be entered that Mr. Hall objects to the question, and that the court overrules the objection, and an exception noted.

The DISTRICT ATTORNEY: The question addressed to you was:

"Q. In what particular do foreign ore- vary from each other, first?

97 A. They vary from each other first in the physical characteristics, just the same as American ore does. Iron ore may be hard or soft. Those are the two general characteristics. I don't know of such a thing as a porous ore or a spongy ore. I know these soft fine ores, and they will absorb in the spaces between the particles of water, but I don't understand them to be spongy or porous. I understand a pore to be a thing that is a part of a constituent of a thing, the same as the skin. I understand spongy to be like a sponge. I don't know of any such ores. There may be occasionally an ore on the surface exposed to the weather where certain of the softer constituents have been taken out.

Q. Such as the clay and sand?

A. Such as the clay and the sand; but I don't know of ores that could be properly termed porous ores or spongy ores. Then the ores may be of different characteristics as to their quality—that is, one may have more or less of iron or silica than another, or oxygen, alumina, phorphorus, sulphur, water."

Q. Now, I understand that statement to apply to foreign ores. That is so, is it not, Mr. Weeks?

A. There are other characteristics also; the color, physical characteristics; their color differs.

98 Q. I don't care about going into a minute analysis. Please state what the variations are in the domestic ores. You have already given the variations in the foreign ores.

A. The variations in the domestic ores are precisely the same as in the foreign ores.

Q. Precisely the same?

A. Precisely the same. I know of no quality, no condition, of foreign ore that is not also found in our American ores. I know of no ore that is produced abroad but that a similar ore is not produced here.

Mr. HALL: I don't think there is any question about it. I don' claim there is any difference.

Q. What do you know about the Carthagenia ores?

A. I only know about them in a general way. As I understand,

in the mines of Spain there are practically produced three grades of ores, which are known there, and I presume also in Carthagena, as Campanil. The Campanil ore is a hard red hematite, the Rubio ore is a hard brown hematite, and the Venaduce is a soft ore that is found in connection with both of these, but chiefly with the brown hematites. Now, I understand there is a spathic ore produced, but in a very small quantity—the first three are.

Q. Which ones have we in this country?

A. I understand they have them all over the country.

99 In the Lake Superior regions we have the same character of hard ore and soft ore; we have the red hematities, the brown hematities, and the soft hematities; we have them all through the country.

Q. You have heard the testimony in relation to these importations—the ores that were described—I think the dry Porman ore and the Camerata ore and the Carthagenia ore. Now, where have we ores in this country like these?

A. I am not enough informed as to these particular ores, whether they are brown or red hematites.

Judge BUTLER: But you have heard the description of these ores as respects their fineness and their liability to absorb moisture?

The WITNESS: I should say that we produce hundreds of thousands of tons of that very grade of ore from the Lake Superior regions, in the Minnesota iron range. I believe they are largely brown ores of a soft variety.

Q. Are those same ores liable or are they not liable to absorb moisture?

A. They are just as sand is or just as comminuted clay shells are; they are liable to absorb moisture.

100 Q. Is it not a matter of fact that a great deal of the iron ore that is found in the Lake Superior region has so much moisture in it at the time that it is transported from the mines that it shakes like a jelly?

A. I would not say a great deal, but some has.

Q. That is, that it carries so much moisture in it that it shakes like a jelly?

A. They call it pudding.

Q. And is it transported in that form?

A. Yes; but it soon dries out.

Q. In the sun?

A. And also in the car. In these open cars it will leak out; the water will run out of the bottom.

Q. I suppose that it is a matter of fact that a great deal of the moisture in the iron ore will dry out if it is exposed to the sun?

A. I should say that practically all of the moisture would dry out of the iron ore or could be made to dry out of the iron ore if exposed to the sun long enough. In different ore I should say that all the moisture—accidental moisture—would dry out in the sun, so that the ore would be just as dry as it possibly could be.

Q. Now, as to these Lake Superior ores that you say have the

same characteristics as the ores in question in this suit, how are they dealt in?

101 A. They are sold by the ton just as the ore comes from the mines.

Mr. HALL: I would like to hear that question.

Q. As to these Lake Superior ores that you say have the same characteristics as the ores in question in this suit, how are they dealt in? Is there any stipulations as to an allowance for moisture?

Objected to by plaintiffs.

Judge BUTLER: The purpose of this testimony is to show whether it is true, as was said by some two or three witnesses, that the signification of iron ore, when applied to this description of ore, means the dry ore, because if it be shown that in dealing in precisely the same character of ore mined in this country there is no such limitation of the meaning and there is no such dealing it bears directly upon the weight and credibility of the testimony which you have given for the purpose of making an exception in favor of this particular description *or* ore.

I don't say what the effect of the argument would be, but it is certainly a legitimate argument that if the designation or signification of the term "iron ore," when applied to this description

102 of soft ore mined in this country, includes the water it would be unreasonable—I say that is a fair argument—it would be unreasonable to believe that the designation of iron ore, when applied to precisely the same kind of iron ore, means the dry ore, without the water, simply because it came from across the sea. That would be an argument that would be for the jury. The court cannot exclude it. It is not direct testimony as to the iron ore in question, but it is testimony in relation to iron ore precisely like it.

The plaintiffs objected to the admission of this testimony. The plaintiff's objection was overruled and the plaintiffs excepted. Exception noted.

Q. Now will you go on and state? How are these ores of the Lake Superior regions like the ores in this suit—how are they dealt in?

Mr. HALL: Do I understand the witness to say that they are like these ores?

Judge BUTLER: Yes. He said they are like them.

Mr. HALL: I understood him to say that he did not know whether they were or not.

Judge BUTLER: You can examine him on that subject.

Q. The question was: Are the iron ores of this country,

103 which you say resemble and are like and have the same characteristics of the iron ores in question in this suit—how are they dealt in in this country?

Plaintiff's objection overruled. Exception noted.

A. They are sold by their weight, whatever it is, without any allowance for moisture. I never heard of a single pound of native ore having been sold in this country without an allowance for moisture, and I know of dealings in millions of tons—not only that quality, but all other qualities.

Q. We don't care about the other kinds. I am now speaking of the ores which are like the ores in question, and that is your answer.

A. That is my answer, that I never heard of an allowance for moisture in selling ores similar to those in this suit in this country except the foreign ores.

Q. When did you first hear of it being alleged that foreign ores were d*elat* in in that way, with an allowance for moisture?

A. I can't recall just the date; probably somewhere about 1880; possibly a little before or a little after that.

104 Q. That some persons who bought and sold iron ores sold them with an allowance for water?

A. Yes, sir; in this country.

Judge BUTLER: You have already testified on that subject and said that foreign ores are sold both ways—with and without an allowance for water?

The WITNESS: Yes, sir.

Q. What is the commercial understanding of the definition of the words "iron ore" as applied to crude minerals of the character of the ore in question in this suit?

Mr. HALL: I note my objection so far as it covers domestic ores.

The objection was overruled.

Plaintiffs excepted, and exception was noted.

The WITNESS: My understanding of the meaning of iron ore is——

Judge BUTLER: The commercial designation.

The WITNESS: I mean the commercial designation of iron ore when it is spoken of generally. I mean by that the iron ore in the condition in which it exists when I am talking about it.

Judge BUTLER: What is the signification of the term as applied to this soft ore?

The WITNESS: That is with the water and everything in it.

105 I would understand that if a man, a buyer or seller of iron ore, gave a chemist, for example, a lot of ore to analyse, saying "analyse this," he would expect him to include everything there was in it in his report, including the hydroscopic and combined water.

Q. But in dealing in it?

A. But they buy and sell largely on the analysis. That ofttimes determines whether they will but or not.

Q. The question is whether there is any difference in the application of the term "iron ore" to these soft ores, whether they be foreign or domestic.

A. I understand that certain parties in buying and selling foreign ores put in a stipulation for moisture and certain others do not.

Q. The question was whether there is any difference in the minds of those who deal in the ores in this country, whether they be soft or hard.

A. Oh, no.

Judge BUTLER: Is there any difference in the signification of the term "iron ore," whether it is applied to the soft ore which absorbs water or to the hard ore?

A. Not at all.

Cross-examination:

106 Q. I believe you said that you were the editor of the Iron Age. You are the editor of a newspaper?

A. Yes, sir.

Q. You never have bought or sold any iron ore yourself?

A. The firm of which I have been a member has.

Q. You were a member of that firm about a year?

A. About a year; yes, sir.

Q. And you never personally had anything to do with the buying and selling?

A. Oh, yes, I did. I might not have made the actual contract for the purchase or sale, but I was consulted in regard to it and talked with the parties whom we sold to in relation to it.

Q. You said, I believe, that in regard to imported ore your knowledge was based on some transactions of Latassa & Co. Is that the name?

A. I didn't say so.

Q. On what is your knowledge of transaction in foreign ores based?

A. My knowledge of transactions in foreign ore is based on a series of inquiries extending over eight to twelve years in order to make market reports for my paper.

Q. In regard to foreign ores?

A. In regard to foreign ores and domestic ores; and I said I had constantly seen and heard of transactions made by Naylor &
107 Co., Earnshaw, Latassa, Read, and Marvel and Crocker, and those six people include all that I know anything about of sales from inquiry.

Q. And how were these ores sold?

A. In some cases they were sold with an allowance for water, and in others they were not.

Q. Did you know of Naylor & Co. selling without an allowance for moisture?

A. I don't know.

Q. Did you ever know of Earnshaw & Co. selling without an allowance for moisture?

A. I don't know, but I heard of the other three.

Q. Latassa & Co.?

A. Latassa & Co. I don't know whether it is a company, but we mean the same thing.

Q. And that they sold without an allowance for moisture?

A. Yes, sir; I know of them selling Marbello without any allowance for moisture.

Q. How many times within your knowledge?

A. I cannot answer that.

Q. Once?

A. Once.

Q. Twice?

A. Twice.

Q. Ten times?

A. I cannot tell you.

108 Q. It may be fifty or one hundred?

A. It may be fifty or one hundred. These transactions extends over a series of years, and I have the names mixed up, and I cannot tell you the transactions.

Q. Can't you give us some idea?

A. No, sir.

Q. Can't you say whether it is ten?

A. I cannot give you any answer other than what I have given you.

Q. Maybe fifty or one hundred?

A. I cannot answer any different from what I have said.

Q. I understand you to say that it may — fifty or one hundred.

A. I cannot tell you.

Q. Who was Mr. Read?

A. I have forgotten his initials; D. W. R., it seems to me it was. I think he did business in Philadelphia some years ago.

Q. And what has become of him; do you know?

A. I don't know anything about him. I have not had anything to do with buying and selling directly for some years.

Q. Where did Latassa & Co. do business?

A. In New York. I believe Latassa is dead. I don't know what has become of his firm.

109 Q. You said that you used to inquire about this for the purpose of making quotations for your paper?

A. Yes, sir.

Q. How did you use to quote foreign ores?

A. In what way do you mean?

Q. How did you make it?

A. So much a metallic unit.

Q. How is that unit ascertained?

A. It is determined by analysis.

Q. Is it the unit of the dry or wet ore?

A. As a general thing, do you mean, or in these particular transactions?

Q. In these quotations.

A. I never asked how it was done. I would simply ask for a quotation on iron and they would say so much a metallic unit.

Q. I think you testified as a chemist that where a man says a unit he means a unit of dry ore?

A. I understood you to ask me in relation to these particular transactions.

Q. What does he understand it to mean?

A. He may understand it to mean a metallic unit of iron in the dry ore or a unit in the raw state.

Q. How is it got at?

A. In both ways. I would understand, without any state-
110 ment whether it was dry or not, that it would be in its wet state, and they would put in an analysis specially dried at 212 if they meant metallic unit dried.

Q. So where you put your quotation in that paper at so much a unit a man could not tell whether it was a dry unit or a wet unit; whether he was to pay—we will say if there are sixty per cent. or sixty units of metallic iron in the ore and it was quoted at ten cents a unit and he was to buy a cargo of 1,000 tons he could not tell from that quotation *where* he was to pay six dollars a ton for 900 tons dry or six dollars a ton for 1,000 tons of wet ore?

A. Oh, yes; he would pay the same, whether it was dry or wet. It makes no difference in a body of ore in a sale of 1,000 tons, where he pays by the metallic unit, whether that ore is 1,000 tons in its natural state or 1,000 tons less the moisture. The price is precisely the same for 1,000 tons in the whole amount. It makes not a particle of difference. It makes no difference whether he pays ten cents for a unit of dry ore or wet ore. It is ten cents a unit for the iron in the body of the ore, and if there are fifty-four units in a 1,000 tons of dry ore it would be the same as 1,000 tons of that less the moisture.

Judge BUTLER: I understood you to say that this method of dealing includes in the analysis everything.

The WITNESS: Yes, sir.

111 Judge BUTLER: Sand?

The WITNESS: Yes, sir; everything.

Q. In that case you have stated is not the water allowed for?

A. No, sir. Is the water allowed?

Q. Yes.

A. In some cases it is and in others it is not.

Q. In either case is it not allowed?

A. No, sir.

Q. Isn't the water allowed for in either way? For instance, we will say here is one thousand tons of iron ore and it is worth ten cents a unit of the iron and there are sixty units in the dry ore, sixty per cent. in the dry ore—that is, it is worth $6 a ton, dry ore, so that they don't pay $6 a ton for 1,000 tons because of the wet ore, but they pay $6 a ton for 900 tons. That is $5,400, isn't it?

A. Yes, sir.

Q. Now, of course, there are not so many units in the wet ore?

A. Do I understand you to allow ten per cent. moisture?

Q. I allow ten per cent. moisture.

A. There would be just the same number of units in that; not one more or less. I think I can demonstrate it to the jury
112 and to the court. I understand the question to be 1,000 tons of ore wet, with ten per cent. of moisture in it, worth ten cent- a unit. The problem is 1,000 tons ore in its natural state. It

contains ten per cent. of moisture, and it is worth ten cents a unit. Is that it?

Q. Yes.

A. Now, 1,000 tons of ore with ten per cent. of moisture in it would take off 100 tons, leaving 900 tons. In that 900 tons, as I understand it, there is sixty per cent.—sixty metallic units in each ton. Now, that is 5,400 metallic unites in that body of ore. Now, that 5,400 unites is both in the 900 tons and in the 1,000 tons. Now, dividing this 5,400 units by 900 tons, to find how may units there are in each ton of the dry ore, you would get sixty units. That is worth ten cents a unit, which would be $6 a ton for that 900 tons. Now, dividing this 5,400 units by 1,000 tons you have 54 units. Now, the 900 tons of dry ore is worth $6 a ton; that is $5,400; the 1,000 tons is worth $5.40, which would make $5,400; so that there would be no difference.

Judge BUTLER: Is not that based upon the fact that you take the ore with the water in it and reduce the number of units in the ton?

The WITNESS: That is it. It makes no difference in the
113 price. It may for a single ton, but for an order of one thousand tons dried at 212, at ten per cent. moisture, you would get 900 tons in one case and pay for 900 tons, which would be $5,400, and in the other case you would pay for 1,000 tons at $5.40 per ton, which would be $5,400.

Q. Where did you deduct the moisture in getting at $5.40 a ton?

A. I did not deduct the moisture. I was speaking of the dry and wet ore to show that there would be no difference in the price in both cases; it would be $5,400.

Judge BUTLER: When you take the moisture out, I understand your calculation to be that it raises the number of units in the dry ton, but it does not raise it in the wet body?

The WITNESS: Yes, sir.

A JURYMAN: If you would take 900 tons of dry ore and put 100 tons of water on it, then it would weigh 1,000 tons, and then you would not have any more iron in it than you had when you first weighed, without the water?

Judge BUTLER: That is just the basis of his calculation.

Q. That is, in arriving at this unit the moisture is allowed
114 for either in deducting it from the analysis or it amounts to the same thing?

A. In this particular case it is, but it may not be. I have seen thousands of analysis of ore that included moisture, and that is the rules the world over, to include the moisture, with the exception of those foreign ores imported into this country.

Q. Now, do I understand that there is not any difference in the result whether you deduct the moisture from the gross weight of the cargo and get the price by the unit at so much a ton or whether you deduct the moisture from the analysis and get a less number of units in a ton; there is no difference; the result is the same? If there are sixty units in the dry ton, then it is $6 a ton for 900 tons; isn't that so?

A. Yes, sir.

Q. And if, however, you make the allowance for the moisture in the analysis and say that there are not so many units in the wet ton because it is wet and only 54 units in that wet ton, the result is precisely the same, the price of the cargo *if* $5,400—that is, the moisture has been allowed for in one case and makes 100 tons for the wet, and in the other case, by taking the moisture from the analysis, the result is just the same?

A. So far as between the buyer and seller.

Q. It does not make any difference whether the moisture is deducted from the weight or whether the moisture is deducted from the analysis?

115 A. No, sir.

Q. How much is ore worth a ton?

A. Where? It is worth all the way from $1 to $10.

Q. This Porman ore?

A. I don't know now.

Q. You don't know anything about the price?

A. Not about the price to-day.

Q. Do you know the price of any of the foreign ores?

A. Not the price to-day. I think I testified that I have not done a great deal of that for the past few years.

Q. What was the price then?

A. I don't know. It has been worth various sums. I presume I have quoted a thousand times, and I cannot tell what the particular price was.

Q. When you made quotations in your paper, how did you make them by the unit? Did you make them by the dry or wet unit?

A. I made them by just what was told me. I say it makes no difference whether it was a dry or wet unit.

Q. So that in either way, as you understand it, a quotation by the unit carries an allowance for the moisture either in a wet or dry analysis?

A. I don't understand that question.

Q. You say it does not make any difference whether it was

116 to be a unit of the wet or a unit of the dry ton?

A. I say that I said the dry or wet unit.

Q. That the result was just the same whether the moisture was taken from the wet ton or taken from the analysis?

A. I say this: That where a person buys a body of ore, say 1,000 tons, it makes no difference whatever.

Q. About the quotations you made in your paper.

A. I repeat it, if a man only buys a ton he gets it the same; but I never knew a man to have a ton of dry ore delivered to him—it is always delivered to him in the natural condition; and so I say it makes no difference. If the ore was delivered to him in a dry state, dried at 212, it would make a difference.

Q. That is, a ton of it?

A. A ton of it or a hundred tons of it. It is never delivered to him in a dry state; it is always delivered to him in a wet state.

Q. It does not make any difference in the price whether the mo-sture is deducted from the wet ton or in the analysis?

A. I don't understand what you mean by deducting in the analysis.

Q. When a man is buying by the unit in that unit there is always an allowance for the moisture?

117 A. No; there is not. I testified that there was not an allowance made for moisture. I testified that certain parties did make an allowance and others did not.

Q. But in the price you did not make any difference?

A. Not ultimately; no, sir; because I say some analysis are made dry and some wet.

Q. But when a man is buying by the unit it does not make any difference in the price, does it, whether the moisture is deducted from the weight or whether the moisture comes out in the analysis—the result in the price of the cargo is exactly the same?

A. I don't know what you mean by deducting the moisture from the analysis.

Q. The moisture comes from the unit, doesn't it?

A. No; the moisture comes from the ore. There is no moisture in a unit. A unit is the metallic iron.

By the COURT:

Q. Excluding everything?

A. Certainly; not only excluding hygroscopic but also combined water. It excludes the oxygen, too, that is combined with the iron in the ore.

By Mr. HALL:

Q. In one case you get 54 units and in the other case 60 units; in one case you allowed for moisture and in the other case you did not. Is not that so?

A. Yes, sir.

Q. That is all I want to get at—that in the one case where

118 you got 60 units you did not allow for moisture and where you got 54 units you did allow?

A. No; we don't; it is just the other way. Where we got the 60 units we did allow for moisture, and where we got the 54 units we did not.

Q. I was speaking about the analysis; but, in order to get 54 units, you have got to allow for the moisture?

The DISTRICT ATTORNEY: Why, no; it is just the other way.

Q. You just take the moisture—take it from the analysis?

A. No; where you have 54 units you allow for the moisture in the analysis, if you can call these brief determinations analyses and not analyses of the ore.

Q. And it is deducted from the analysis, isn't it?

A. Not where you get the 54 per cent.; in the other case it is.

Q. In one case, where you have your 60 units, the moisture is deducted from the weight of the ore, isn't it, and where you get your 54 units it is deducted from the analysis?

A. Oh, no; it is in the analysis.

Q. It is deducted from the units. You get 54 units instead of 60 units because there is ten per cent. of moisture?

A. Yes; but you get it in one case where you have 54 metallic units. The analysis includes the moisture—that is, the basis
119 of your percentage of units is on the ore with the moisture in it—that is, 54% of your ore with the moisture in it is metallic iron. In the other case 60% with the moisture out is metallic iron.

Q. But in the case where you took your 60 units the moisture is deducted from the weight of the cargo, isn't it?

A. Yes, sir.

Q. And where you get your 54 units the moisture is deducted——

A. (Interrupting.) There is no moisture deducted.

Q. Isn't there an allowance made for it? How do you get 54 units?

A. No, sir; you simply get two analysis. One shows the ore with the water in it, and the other shows the ore with the water out of it.

By the COURT:

Q. It shows in the mass with the water in it in the one case, and in the other with the water out?

A. That is it exactly, and you simply say 54% of that mass is iron with the water in it, and in the other case 60% with the water out of it is iron. You cannot deduct water from metallic iron.

By Mr. HALL:

Q. Now, in order to make your analysis, does not the iron
120 ore have to be dried at 212?

A. No, sir; it may or may not. There is a wet method of analysis as well as a dry method of analysis.

Q. Didn't you hear the testimony of Mr. Garrett here?

A. Part of it, sir. I can't say that I heard it all.

Q. Didn't you hear what he said about analysing this ore?

A. Yes, sir; ore dried; that he, in order to analyse it, had to dry it. But you cannot digest ore without pulverizing it. It takes a little longer, but it can be done.

Q. Then, to leave this question, as I understand it, it does not make any difference in the price of this ore, where you buy by the unit, whether you deduct the moisture from the weight, because there you have a greater number of units, or whether you allow for the moisture in the cargo, and there you will have a less number of units?

A. That is it; but I cannot understand deducting moisture from metallic iron.

Q. That is the only proposition, now that we understand each other.

A. I think we do, sir.

Q. That it does not make any difference in the price. I hope the jury understand it, that it does not make the slightest differ-
121 ence whether you take the moisture and deduct it from the weight or whether you leave the moisture in and have a less

number of units, which goes to the deduction made in calculating units; the price is just the same. Now, Mr. Weeks, you testified that ores like the Porman ores, like the ores in suit, were produced at Lake Superior. Now, will you name some Lake Superior ores that are like the Porman ores?

A. I don't think I testified that exactly.

Q. What did you testify?

A. I testified that I was not acquainted with these special ores in question; that I knew the Spanish ores as a body as so and so.

By the COURT:

Q. Taking these ores as described here on the witness stand by the plaintiff's witnesses—that is, these fine ores?

A. Fine ores; certainly.

Q. That are liable to come on the salt water?

A. That is it.

Q. That we have just such ores in abundance in this country, and I think you named the districts of the country.

A. Yes, sir.

Q. And that is the extent of the question.

122 A. As I understand it, as I say, a great many of the ores. What is known as the Norway region, the Norway mine, I think, is a soft ore, for example, in the Lake Superior region.

By Mr. HALL:

Q. You are not acquainted with these Porman ores?

A. Only in a general way; the ores of Spain I testified that I was not acquainted with except as to their softness and hardness.

Q. Would you know a Porman ore when you saw it?

A. I might and I might not. I have seen Porman ore.

Q. You don't even know that you would know a Porman ore if you saw it?

A. No, sir; but I know those general ores. Whether I could tell a Porman ore by name I can't say, but I could look at it and say if it was a soft hematite or a brown ore or a specular ore or a magnetic ore or with those characteristics, but I could not say that that came from Porman or Alveto or Elba.

Q. About this Marbello ore; what kind of ore is that?

A. I think that is a hard ore.

Q. Does it have any moisture in it?

A. All ores have moisture in them.

Q. Of course, a brick has moisture in it; a paving stone has moisture in it. There isn't any substance in nature that has

123 not moisture in it; but what I mean to say is does this Marbello ore have any moisture in it?

A. Yes; some.

Q. Isn't it a hard ore?

A. Yes, sir.

Q. Isn't it about as hard as a paving stone?

A. Possibly as hard. It may not be as close grained, but hardness and fineness of grain would be two different things.

Q. It would suck up about as much moisture as paving stone, wouldn't it?

A. No; because it is more granular.

Q. But it is just as hard?

A. I know; but hardness and texture are different things. Hardness does not apply to texture, and in the scale of hardness I think iron is harder than paving stone. Paving stone may be a great many things.

Q. I don't mean iron, but iron ore. Have you any idea how much moisture it does carry?

A. No, sir.

Q. Its moisture would be on the surface, wouldn't it?

A. Oh, no; it would be all through the body of it.

Q. Do you suppose it would carry as much as 1%?

A. I don't know anything about it. It might carry a great
124 deal more. I understand you to refer to what you called the other day accidental moisture.

Q. Yes, sir. Now, Mr. Weeks, I understand that you are acquainted with the soft, porous ores and the readiness with which they absorb moisture. You testified if they were placed in the sun the moisture would dry out?

A. I testified to soft ores. I didn't testify to porous ores.

Q. Well, soft ores; and they will absorb moisture very readily, will they not?

A. The moisture will get in between the particles of the ore just as it will get in between the particles of sand.

Q. Now, suppose that you had left on the ground a heap of this ore that weighed 900 tons, and while lying there a rain-storm should come and it should rain on it, so that after a week it weighed a thousand tons, in your judgment, would there be any more ore there at the end of the week than there was before the rain?

A. Yes; in a commercial sense there would be 100 tons more—that is, if it was sold immediately after that.

Q. Suppose that there was in the yard of an ore dealer a pile which made 900 tons and a man came and looked at it and bought it and before it was delivered to him a rain-storm came and
125 it then weighed a thousand tons and that ore heap was weighed out to him at the price he agreed to pay for 900 tons, do you understand that he would pay for that thousand tons the sum which he agreed to pay for the 900 tons he saw before?

A. Precisely that thing is done almost every day in selling these Lake Superior ores. These ores lay on the dock at Cleveland for months, subject to rain and snow, and sometimes the snow is so that they are packed down, and that is loaded into cars and weighed, and that is the weight on which the settlement is made.

Q. Isn't there some allowance?

A. Not a drop.

Q. When a man knows it is wet don't he get his allowance for the price?

A. No; he don't.

Q. But I mean something that has happened to this ore after the man had bought it.

A. That is exactly what I mean. The ore is brought down from the Lake Superior ports and put on the docks in Cleveland in the summer and then rained on or snowed on, and with that rain and snow in it it is put in the cars and sold.

Q. That is hardly responsive to my question. I would
126 like to ask you another question. Suppose that this 900 tons in its dry state should be laying in the yard and a man should come and buy it at $6 a ton and that night the seller should turn the hose on it and the next morning it weighed a thousand tons?

A. I think it would be a good chance for an action against him for fraud.

Q. That would not be a part of the ore?

A. Not in that case.

The COURT: I think that that is a hypothetical case.

Q. Do you know of any cases of men owning mines where the ore is exactly of the same character—two mines adjoining each other, and one of these mines, from springs or something of that sort, is wet and the other dry—the ore that comes out is the same kind of ore?

A. I don't recall any such case, but I would not be surprised if there were such cases.

Q. You don't know of any such?

A. I don't recall any such cases, sir.

Q. If there was such a case as that within your knowledge, in your judgment would there be any difference in the price between the ore that came out of the mine wet and the ore that came out of the mine dry?

The WITNESS: They being precisely of the same character?
127 MR. HALL: Yes, sir.

A. I don't think there would be.

Q. That is, in one case they would pay for the water and in the other case they would not?

A. In both cases they would pay for the ore. I never heard of any difference being made because an ore was wet or dry.

POWELL STACKHOUSE, vice-president of the Cambria Iron Company for seven or eight years and connected with the company directly since 1856, testified:

Q. During that time have you dealt in foreign ores as well as domestic?

A. Yes, sir.

Q. Of various kinds?

A. I guess in the bulk we have purchased and used *were* nearly all the representatives of the foreign ores, and the same way with a great many of the native.

Q. Now, what, among those with whom you deal and from your

own knowledge, is the meaning of the words "iron ore," commercially speaking?

Mr. HALL: If your honor please, the same objection applies, of course.

128 The COURT: Certainly; let the objection be noted. I understand this objection and exception to cover all this; every bit of it.

Exception taken.

A. Iron ore I would consider to mean the ore as mined and delivered at the mine on the surface.

Q. Are you familiar with the various kinds of iron ores?

A. Well, somewhat.

The COURT: As delivered at the surface?

The DISTRICT ATTORNEY: Yes; at the mine.

By the COURT:

Q. Suppose there would be some detriment in the weather, then what would the term mean?

A. The same, sir; the weather wouldn't affect it, either in making it moist or drying it out. The purchaser has generally to take that chance.

Q. That is, the term iron ore means the ore as it is found in the body of the earth?

A. Yes, sir.

Q. And whether taken from the earth or on the car or whereever it may be?

A. Certainly.

Q. It is taken under the circumstance as it is?

129 A. Yes, sir; you cannot exclude the moisture from it unless you apply heat to it, and that is only done when it arrives at the furnace.

By the DISTRICT ATTORNEY:

Q. Mr. Stackhouse, as an officer of your company, you have within recent years purchased foreign ores, have you not?

A. I have attended to the foreign ore purchases since about 1877, I think. Within that time we have probably purchased between a half and three-quarters of a million of tons.

Q. And you have also within the same period purchased domestic ores?

A. Yes; both purchased and mined.

Q. It has been testified to here by a number of witnesses, and I do not think that it is seriously disputed, that in purchasing foreign ores there is a stipulation that there shall be an allowance for moisture. Now, what do you know about that?

A. There is such a stipulation in vogue to-day; but that is, I think, altogether a matter of special contract. If you were to-day to buy from an importer a quantity of ore and you made no stipulations regarding that I think he would deliver you the ore as it

was delivered o-t of the vessel and weighed over the scales,
130 and you would pay for it in that condition. Of course, if you guarded that, which any good purchaser would—he would guard that point from the very fact that foreign ores are more or less unreliable. You have got to protect yourself. That is the reason that that custom has come in vogue. I think it came in use shortly after 1880. It may, of course, have been used exceptionally before that time; but during the year 1880, what is called the "boom year" in business, there were immense quantitites of foreign ore sent in, and the foreign miner, either through his anxiety to push out a large product and sell it at a high price or thinking that the purchaser would have to take what he delivered him, allowed the quality of a number of the ores to run down very considerably.

Q. Why is it necessary to make a stipulation of that kind as to purchasers of foreign ore when they are not made, as has been testified here, in regard to domestic ores?

The COURT: He stated that it was because foreign ores were found after a time to become unreliable, impure, and it was found necessary to guard against that; but if there is another reason——

The DISTRICT ATTORNEY: But there is another reason, if the court please.

131 Q. There is another reason, as I understand it. What is that? Why is it that that stipulation is made as to foreign ores and yet not made as to domestic ores?

A. With the domestic ores each miner has a certain standard, which he probably has arrived at and maintained through years. If he allows the standard of his ores to run down he feels the effect of that in his price very promptly, and the foreign miners—as I understand there are more or less of those ores—a good many of them, at least—I have never been there, but I am only speaking of knowledge obtained from some of the importers. The ores in some of those districts are gathered together from different mines. Some of them are handled, probably, by the miners direct, but a great many of them by men who purchase the ores as delivered at the seaport and afterward resell them to the trader on this side or through London or French houses.

Q. In the one case, as I understand it, you have the responsibility of the domestic producer, who is well known; in the other case you have the agent or broker of the foreign ore producer, and the purpose, as I understand it, is to fix the responsibility with the person from whom you buy it by means of a contract?

A. The purpose is to actually pay for what you get; noth-
132 ing more and nothing less. If you do not guard yourself you may not.

Q. Are you familiar with the ores of the Lake Superior region?

A. Yes, sir.

Q. Do you know of the character of the iron ores that are in question in this suit—the Spanish ores?

A. What is the particular ore?

Q. The Carthagenia, the Camerata, and the Porman.

A. Yes, sir; we have used, I think, all of those ores.

Q. Isn't it true, as a matter of fact, that there is a general resemblance, and I mean now particularly as to the amount of moisture that they usually contain, between the Spanish ores, of which these are specimens, so to speak, and iron that is produced in this country?

A. Oh, there is no doubt of that. I have purchased from a gentleman ores that I think ran as high as 10 % of moisture, and we know from our own mining that soft hematites frequently have as much moisture as that and the ores that we purchase also from ten per cent. down.

Q. Then it is a matter of fact, which you speak of from your experience, that there is as much moisture in some kinds of American ore as there is in the foreign ores?

133 A. The amount of moisture depends upon the physical characteristics of the ore.

Q. And that the same variations in the amount of moisture in iron ore apply as well to domestic as to foreign ores?

A. Yes, sir; the ores of similar physical characteristics probably contain as much moisture, whether domestic or foreign. That don't affect them at all.

By the COURT:

Q. And, as I understand you, we have ores of this particular description that are involved in this case mined in this country?

A. Of a similar physical character, sir. They may not be exactly like these, but very nearly like.

Q. That would be just as liable to absorb moisture?

A. Yes, sir; just be as liable.

Cross-examination:

Q. You are familiar with the dealings in imported ore?

A. Yes, sir.

Q. Isn't it a fact that in the great majority of sales of imported ore an allowance is always made for moisture?

A. Of recent years, yes, sir; of former years, not.

Q. Where do you draw the line?

134 A. I think the line would commence about 1881—that is, the present system of purchasing ores—that is, buying at dried at 212, allowing the moisture, which is practically the same as buying in its natural condition with a guarantee. It amounts to exactly the same thing both to the seller and the buyer. It started, probably, in 1881 or 1882. There may have been isolated cases before that, but it did not become general until later years.

Q. There is one thing I would like to ask you, because I think you are probably more familiar with this than any other witness that has been here. Does it make any difference in effect in buying and selling these ores and of the allowance for moisture whether the allowance is made by deducting the amount of moisture from the weight or whether it is made by deducting it from the analysis?

The WITNESS: Or from the price?

Mr. HALL: Yes, sir; the result is the same thing.

A. If you would purchase it in its natural condition. I think Mr. Weeks has explained that partly and probably pretty fully; but if you purchase ore in its natural condition it is just the way in which it is received and weighed over the scale, pays freight
135 and probably pays ocean freight, the way in which miners settle. In that case it pays one price. If you take it in the condition in which it is now sold and which is more a matter of convenience for chemists, I think, then, you recognize that in the price. It is absolutely the same. If you buy a thousand tons of ore in its natural condition it would make just as many tons of pig-iron as if you bought 900 tons with 10% less moisture.

By the DISTRICT ATTORNEY:

Q. That is, the 900 tons would make just as many tons of pig-iron as the thousand tons?

A. Yes, sir.

By Mr. HALL:

Q. You understand that in order to get at the unit of the ore it is dried at 212 degrees?

A. It is necessary to do that in order to make the chemist's analysis, but in making that analysis the chemist takes his sample of ore and expels the water from that and calculates the per cent.

Q. Then, in order to find what the natural condition is he deducts the water from the analysis in finding how many units there are in the natural condition?

136 A. No; if the laboratory sample was a pound, to illustrate the idea, the first thing he would do he would weigh that in the condition that represented the ore just, probably, as it is delivered. He would dry that. He might expel from that one-tenth of its bulk of moisture, whatever that would be—10%, say—and he would proceed in his chemical composition with the ore dried at 212.

By the COURT:

Q. Isn't the water part of the mass?

A. Certainly.

By the DISTRICT ATTORNEY:

Q. Necessary to it?

A. Certainly.

By Mr. HALL:

Q. Then when he has found 60% at 212 degrees and there was 10% of moisture he deducts 6 units from the 60 on account of the water, leaving 54 units for the whole mass; is not that it?

A. That is the way he determines its natural condition.

Q. So therefore he deducts the water from the analysis, and he deducts nothing else?

A. He determines that by calculation. In other words, he dries

his sample, having taken out the wet sample. He dries it at 212,
he reweighs it and determines how many units he has got
137 less, and that shows he has ten per cent. in this case in question, and then determines his per cent. of iron, silica, phorphorus, or any other elements that may be called for.

By the COURT:

Q. When you take the whole analysis and ascertain the percentage of iron isn't everything excluded but the iron? When you make the analysis, a part of which you say is to extract the water—when you proceed with that analysis don't you, by analysing the mass, extract everything in ascertaining the units of iron?

A. That is, if you want a special exhaustive analysis.

Q. Would not that be the effect of an analysis?

A. Yes, sir.

Q. The result?

A. To determine the water is just as much of the chemist's work as to determine the iron ore in it.

By Mr. HALL:

Q. What I mean to say is that you understand that the chemist finds, after he has dried the ore at 212 degrees, that there is 60% of metallic iron. Now, in order to determine how many units there are in the whole mass, the only thing which he deducts from that 60% is the moisture?

A. Now, let me illustrate.

Q. It is the 60% of moisture, isn't it?

138 A. Let me tell you how the chemist would do that. He would do it by the rule of proportion, something of this kind: If he has determined, we will say, 60% of iron dried at 212 degrees in his sample, he first determines 10% of moisture. Now, then, as 100 is to 90, which is the original bulk less its moisture, so is his determined 60% at 212 degrees to the answer, which in this case would be 54.

Q. And the only thing that is deducted is what?

A. He don't deduct it at all.

Q. Well, how does he get the 54?

A. Simply by calculation, sir.

Q. But what has been deducted from that 60 to make 54?

A. It is a matter of proportion, sir.

Q. But what is the 6, the difference between 54 and 60; isn't it moisture?

A. It is a matter of calculation, sir.

Q. No; but what is that 6 that is taken out?

A. As two is to four, so is eight to some other number.

Q. In the one case he has 60 units of iron?

A. Or 90% of the bulk of it.

Q. Yes; and in the other case he has got 54%?

A. Or the whole bulk.

Q. One with the water out and the other with the water in; so

that, in order to get his 54, the difference between that 54
139 and that 60, that 6 which he takes out, is moisture, isn't it?

A. It represents the difference between the sample that he operates on at one stage of his process and the other.

Q. Yes; it represents the difference between the ore wet and the ore dry; in the one case the 60 is the ore dry, and in the other case the 54 is the ore wet.

A. Yes; but we have no 212 ore dried in nature, that I know of.

Q. But in one case 60 represents the ore dry and in the other case 54 represents the ore wet, and in order to get 54 instead of 60 he takes the 6 from 60 and leaves 54, and that 6 represents the difference between the ore wet and the ore dried.

A. Those figures make so much, but he don't take it in that way.

By the COURT:

Q. One of the witnesses says that you take off ten per cent. of water in the analysis—in other words, to ascertain what the bulk contains, if you allow ten per cent. for water and take it off you have 90% remaining and you have 60 units in that.

A. Yes, sir.

Q. What constitutes the difference between the 60 and the 90, sand and what else?

140 A. It is silica, aluminum, iron, phosphorus, and a number of other elements.

Q. And that is taken off just as the water is taken off?

A. Certainly.

Q. And if you leave the water on it reduces in quantity the amount of iron?

A. Yes, sir.

Q. That is, the proportion of iron?

A. The proportion.

By the DISTRICT ATTORNEY:

Q. That is, the 60 is a larger proportion on than the 90?

A. Yes, sir.

WILLIAM D. MARVEL, of Flushing, L. I., dealer in ores and metals, importer of iron into and owner of mines in the province of Almeria, in Spain, testified:

Q. Will you please state to the court what is the commercial designation of "iron ore" as applied to foreign importations; what is your understanding of the custom?

A. Iron ore is that metallic substance which — taken from the mine in its crude condition, prepared and separated from
141 rock and earth, and in its utmost metallic purity, according to the natural character of the ore in that form in which it is seen and marketed, in which it is known, used, and bought and sold as iron ore.

Q. Have you imported largely of foreign ores within the past few years?

A. Well not very largely.

Q. To what extent?

A. I confine myself to the superior qualities, and therefore do not go into the lower grade of ores, but within the last few years several hundred thousand tons. I am speaking off-hand. I have been away, out of the country, for three years, and I say several hundred thousand tons; it may be one or two hundred thousand.

Q. The foreign iron ores vary in their constituent parts very largely, do they not?

A. There are no two ores in the world exactly alike.

Q. But in their general characteristics the ores of this country and the ores of *the* continental Europe are very much alike, are they not?

A. They have ores that are classed under similar characters that have great similarity in their appearance and in their constituents also.

Q. The hygroscope water, so called, is found to a greater or less extent in all iron ore, is it not?

142 A. What chemist would term hydroscopic water is found in all iron ores, I believe—that is, the water which would be given off, if heated, at a heat of 212 degrees Fahrenheit.

Q. And your statement applies as well to domestic ores as to foreign ores, does it not?

A. To all iron ores.

Q. Do you know what is the largest amount of hydroscopic water that is found in connection with foreign ores of any particular kind; are you able to say?

A. That I could not say, because it would cover so large a field. The Bogg ore contains a very large per cent. of water.

Q. What per cent.?

A. I think some of them would run up to 30 %.

Q. And that ore is found as well in this country as abroad?

A. It is found in this country as well as abroad. Those, however, are not used so much nowadays because of their inferior quality.

Q. But they have been used?

A. They have been used. Many years ago it was the only ore that was used in this country.

143 Q. Now, then, take an iron ore that is similar to the Lake Superior ore, the brown hematite, and the red hematite. That ore has a very large amount of moisture in it in its natural state, hasn't it?

A. It has a large amount of water proportionably and varies very much in the season or the weather through which it has to pass in transportation.

Q. Now, in that particular, in its absorption of water in its natural condition—I am speaking now of the Lake Superior iron ore—there are foreign ores that correspond to that in that particular, are there not?

A. Yes; but you are covering a very large variety of points in the Lake Superior district.

Q. I am aware of that. I am now speaking of the particular variety of the Lake Superior region that absorbs or holds in mechanical combination with it a large amount of moisture.

A. Yes; the same ores relatively in the point of moisture that obtain abroad.

Q. And that are imported into this country?

A. They are.

Q. I understand you to say that you deal in the foreign product almost altogether. Is not that so?

A. Lately I have dealt very little in domestic ores.

Q. Now, what is the custom among those with whom you
144 deal as to the manner in which the foreign ore is sold and how is it treated and regarded?

A. Well, I shall take pleasure in confirming the witness that the plaintiff put in, that I sell ore by the ton and in no other way.

Q. Is there any stipulation as to the amount of moisture that your iron ore contains?

A. Yes, sir.

Q. You sell it as it is sold in this country, do you not?

A. I sell it as it is sold in Europe and in this country.

The COURT: In this connection, as you have asked him, isn't it more convenient to ask him how this same category of ore is dealt in here.

Q. You are familiar with the different kinds of ore—familiar with the domestic ore that resembles the foreign ores that are in question in this suit. How are the domestic iron ores that so resemble their ores dealt in?

Plaintiff objects, and objection overruled and exception noted.

A. I never knew ore to be bought, sold, used, or dealt in except by the ton in its natural condition. That is the condition in
145 which it is bought, sold, and used. I never heard any such terms until I heard of the contracts in this case.

Q. When did you first hear of them?

A. I think perhaps a little over two years ago—two years ago last spring, I think.

Q. Are you able to tell the court why it is that these stipulations that have been testified to by Mr. Earnshaw and the other witnesses called are made as regards the foreign product, but are not made as to the domestic products which are similar in character?

A. I can't see any reason for it whatever.

The COURT: I understand the witness to say—I may have misunderstood him—that he had no knowledge of this special method of contracting for foreign ores until when?

The WITNESS: Until about two years ago. I never heard it before.

By the DISTRICT ATTORNEY:

Q. Can you give us an intelligent understanding why it is?

A. I say I can see no reason for it whatever. It seems to me to

be merely a juggle with figures, and it is the same thing in the end one way or the other.

Q. That is to say, if a man buys a thousand tons of ore, and
146 it is ascertained by an analysis made by the chemist that a certain part of that ore contains 54 or 60 per cent. of metallic units, that that applies to the thousand tons as well as to the 900?

A. The other elements of an ore which make it desirable for a particular purpose—the value of that ore primarily is in its metallic yield, and it is upon that basis alone that the furnace considers the value of an ore, and the character of any well-accredited ore is well known, so that it will run in all *in all* right straight along about the same thing. Now, if that ore is dried, I should use the same figures I heard as I came in; if that ore is dried, as it is called, there is nothing in there but the sample dried—that is, the sample contained in the laboratory. If the dried sample shows 60%, as the figure was used, and the natural condition shows 64, and the deduction is made for the 10% of the moisture, it amounts to exactly the same thing. It is the difference between fifty-ninetieths and fifty one-hundredths, and it is paying for 900 tons at $6 a ton or a thousand at $5.40. It is a mere juggle with figures; it is immaterial; and the furnaces settle their value solely and only upon the amount of iron in the ore received. Dry ore is never delivered; it is not an article of commerce; it is never dealt in, never bought and never sold.

147 By the COURT:

Q. Where so many tons of iron ore are bought by the unit, what is bought is metal?

A. That is the value.

Q. The metal contained in the mass?

A. Contained in the mass.

Q. And therefore in this purchase does he exclude all other foreign matter as well as the water?

A. There is no other object of value, I say.

Q. Is the contract binding him to pay for nothing but the metal, excluding all of the foreign elements that enter into the mass called iron ore?

A. If your honor please, I will try to make that plain. As I said at first, the characteristics of the ore being settled are desired for the purpose, say, for -stance, of the steel-making business. Then the value of that ore is entirely, solely, and only in its metallic yield; there is no other consideration of value.

Q. Then the result is that everything is cast out in ascertaining the price and nothing is paid for but the yield of metal?

A. The oxygen, the silica, the aluminum, and the moisture which is not chemically combined are all a part of the ore, one with the other.

Q. But cast out by this analysis?

148 A. That is merely done in the laboratory.

Q. Oh, I understand that, but the man pays for nothing but the metal?

A. Yes; he pays for the mass, so much per ton; but the reckon-

ing of the value is simply the means of getting at the value of the total.

By the DISTRICT ATTORNEY:

Q. He pays for a ton of iron ore measured by the units of iron that it contains?

A. Exactly.

Q. In making an analysis of iron to ascertain the units of metallic substance that it contains it is necessary to do other things than exclude the water, is it not?

A. Well, the making of an assay—an analysis.

Q. How is the metallic unit in a ton of iron ore ascertained?

A. By a sample supposed to be selected as a fair sample of the ton or the cargo or the quantity, whatever it may be. It is taken to the chemist, who dries it to the point of heat at 212 degrees Fahrenheit, and then the sample is pulverized into a powder, and then by different processes, according to the chemist's way of treating the iron, that pulverized mass is precipitated and that is
149 weighed, and it is the percentage of the whole mass. The drying is simply to get the quantity into a condition for pulverization, so that the amount of iron can be ascertained.

Q. And that is the way the unit of iron is ascertained?

A. That is the way the unit of iron is ascertained.

Q. You have personally visited a great many foreign iron-ore mines, have you not?

A. Not comparatively a great many, but I have visited some of the most important.

Q. Such as——

A. The Hodbarrow and other mines in West Cumberland, in England, and I have visited Bilbao, which is the greates- mine in Spain, the Marbello, and also the Campanil district, which is practically the same as the Porman district, separated by a mountain range.

Q. Have they a different manner in each of these mines of extracting the iron ore, or is the same plan followed in all of them?

A. The mining generally is carried on in different ways, the same in this country. It is either done by shafting or by tunnelling or by uncovering and picking out the ore from the bank after the rock has been taken away.

Q. You lived in Spain for quite awhile?

150 A. I lived there for the most of the time for the last three years.

Q. And you are familiar with the Spanish mines?

A. Yes, sir. There are only those mines of importance. There are some small mines, but none of importance except those I have spoken of.

Cross-examination:

Q. The foreign ore which you sell is the ore that comes from the Hodbarrow mines, isn't it?

A. From the Hodbarrow chiefly.

Q. How much of it is sold in this country?

A. It varies according to the time; 25,000 to 75,000 or 100,000 tons a year.

Q. And this other ore that you sell is Spanish ore?

A. Yes, sir.

Q. And you always sell it without any allowance for moisture?

A. Sold by the ton.

Q. And you said that the first time you ever heard of this selling by the unit and an allowance for moisture was about two years ago?

A. I said the first time that I ever heard of deducting an allowance for moisture from the ore was about two years ago; about two years ago last spring, I think.

151 Q. So that the first time that you ever heard of a deduction being made for moisture in selling iron ore was about two years ago?

A. I think it was about two years ago last spring.

Q. And you never heard before of its being sold except by the ton?

A. I di-n't say so.

Q. What did you say?

A. I said that the first time that I heard of ore being sold by making allowance in weight for moisture was, I think, two years ago last spring. If your honor please, I think the counsel does not understand the difference between selling by unit and selling by moisture deduction.

Q. Is there any difference in the result, where it is sold by the unit, whether the moisture is deducted from the weight or whether the moisture is deducted from the analysis?

A. That depends upon the special provision placed in the contract.

Q. Is not the result the same thing, where it is sold by the unit, whether the deduction is made from the weight or the deduction is made from the analysis?

A. It is impossible to be the same. There is no deduction made from the analysis.

152 Judge BUTLER: Of course I will not interfere with this examination, but I will say to the counsel that in the view taken in this case this question, in the mind of the court, it is not necessary to spend much time upon.

Q. Are not all ores sold by contract?

A. Yes, sir.

Judge BUTLER: I mean contract relating to this subject.

The WITNESS: Contracts in the significance of a purchase and sale, not always a written contract. I have had verbal contracts running with one firm in this country that have been running from year to year and from time to time; they have been running a number of years.

Q. I suppose every sale made by contract is a special sale made by itself, isn't it?

A. As a sale it is a sale by itself, but the same terms and the same rules govern it. It is in the same form one after another. It might as well be the same contract. The price might be different.

Q. Have you ever dealt in domestic ores?

A. I have to some small extent. I have an interest in American ores myself.

Q. These ores are very spongy, of a porous character, these foreign ores, such as those in this suit, the Porman, the Ca-tha-

153 genia, and Camerata?

A. Aren't there some other kind of ores in suit?

Q. Those are the ores now in suit.

A. I don't recall either one of those ores as spongy.

Q. They readily take up and give out a great amount of moisture, do they not?

A. I should say the Porman ore would take up considerable moisture. I should think the ——

Q. Have you ever been at the mines at Porman?

A. No, sir; but I have been on the mountains where the ores have been taken down to the seashore on donkeys.

Q. This ore is taken down on donkeys and left on the seashore until it is shipped?

A. Yes, sir.

Q. It does take up and give out moisture readily, doesn't it?

A. I cannot speak as to the amount, but it would be naturally the same as the mines in this country.

Q. And in ores of a soft character the moisture would vary all the way from 1 to 12 per cent.?

A. It would depend upon the condition in which the ore was found in nature and also upon the condition of the weather.

Q. Ores are found of this kind that vary in this amount?

A. According to their character.

154 Q. Do you mean to say that this moisture which is taken up by rain or which evaporates by the sun is considered by merchants a part of the ores?

A. It is, sir, by the nature of circumstances, by the nature of the materials itself, by the methods in which it is handled, by the methods in which it is transported and been exposed; that has always been part of the ore, and it is so considered.

Q. Suppose you had a cargo of ore that was in a dry conditon weighing 900 tons and it should be subjected to a heavy rain, so that after the rain it weighed 1,000 tons, would you consider that you had more ore there after the rain than before?

A. I should consider that I had as much more ore as it had absorbed the moisture, and I should consider the value of the ore proportionately as to the unit of the whole.

Q. But you would not expect to get any more money for that 1,000 tons than you would for 900 tons before it was wet?

A. No; I should not say that I would.

Q. It would not be considered worth any more?

A. You are speaking now of a specific case?

Q. Yes.

A. In treating of an ore you must treat it as to its
155 character.

Q. What I wanted you to answer was the question whether you would get any more money for that ore as it weighed 1,000 tons with the water in it than you *you* would for the 900 tons a week before it was rained upon.

A. You are assuming that such would be the case?

Q. Yes.

A. It would not be the case. It is purely hypothetical.

Q. I understand you to say that these ores would absorb a lot of water?

A. So they would, but you must bear in mind that they are weighed and shipped in the cars.

Q. I am supposing a case of an ore that laid in the yard, whether, in your judgment, there would be any more ore in that pile or whether any greater price could be gotten for that pile of ore after it was weighed than before.

A. That would depend upon the terms and conditions of the contract of sale.

Q. Can't you answer the question plainly?

A. I am perfectly willing to answer your question, and if you will put a question in a commercial way I should be most happy to answer it.

156 Q. What I want to ask you is: Suppose we have a pile of ore that weighed 900 tons and by reason of rain or exposure to rain it has absorbed moisture until it weighs 1,000 tons, is that pile weighing 1,000 tons any more valuable or can you get any more money for it than the pile of ore that weighed 900 tons before it was wet?

A. The question is a supposition, in the first place, that is improbable, because the ore in its natural state will not absord so much water.

Judge BUTLER: The simple question is whether the addition of this water adds anything to the value of the mass.

The WITNESS: Upon the supposed case I should say no.

Q. There would be no more ore for the purpose of commerce in the pile that weighed 1,000 tons than in the pile that weighed 900 tons?

A. Yes; there would, because you load it on the train and ship it and you would have to pay freight on it.

Q. I mean for buying and selling.

A. Yes, sir; you must bear in mind that dried ore is not an article of commerce. It is never bought or sold or used.

Q. In your judgment?

A. In everybody's judgment that knows anything about it.

157 Judge BUTLER: That is your understanding of it.

The WITNESS: It is a fact that it is not an article of commerce in that condition.

Judge BUTLER: But still, with water added to it, it would be sold by the ton?

The WITNESS: By the ton. Then there would be some means of ascertaining the value by the ton.

Q. So that I understand, in your judgment, the case which I supposed, the ore pile which weighed 900 tons and the ore pile which weighed 1,000 tons are the same, so far as their commercial value is concerned?

A. I did not say so. I said that they were the same as a commercial commodity by the ton. The question determining their value would be another determination.

Q. I understood you to say they would be of the same value.

Q. You misunderstood me.

Q. Can you get any more for the 1,000 tons than you can for the 900 tons?

A. Ore of the character would be determined by its unit value.

Q. Is the pile that weighs 1,000 tons any more valuable commercially to buy and sell than the pile that weighs 900 tons dried?

158 A. Under what conditions?

Q. One weighs 900 tons and is dry, and the other weighs 1,000 tons and has been weighed down by a rain storm which lasted a week, and now is the pile which weighs 1,000 tons which has been weighed down by the rain any more valuable for commercial purposes, to buy and sell as iron ore, than the pile that weighs 900 tons?

A. It is not worth any more for commercial purposes.

Q. That is, this pile of ore which weighs 1,000 tons because it has been weighed down by rain is no more valuable commercially to buy and sell than the pile of 900 tons weighs before the rain — to fall?

A. Yes, sir.

Judge BUTLER: In other words, the water does not add anything to the value of the mass?

A. No, sir; the iron that is in the ore is what makes the value.

Q. That is, the water does not add to the metal in the mass?

The WITNESS: No, sir. The mass is sold as iron ore and by the ton.

159 FRANK S. WITHERLY, of Fort Henry, New York, engaged in the business of mining, producing, selling, and manufacturing iron ore, testified:

Q. About how much a year?

A. Well, say within a radius from 300,000 tons to 450,000 tons.

Q. And how does that compare with other firms that are engaged in this business as to the amount of production?

A. I think it is next to the largest. Some years it may be the largest and other years not; but it has certainly been second for the last ten years.

Q. Are you familiar with the trade customs of the dealers in imported ores?

A. Yes, sir; I consider I am from coming in contact with them.

Q. Please state whether or not there is a commodity in ores in the dealing of foreign ores known as dried iron ore.

A. No, sir; I don't consider it exists commercially.

Q. Is there a commodity among foreign ores or among the dealers in foreign ores known as iron ore?

A. Yes, sir.

Q. What does it mean?

A. I take it that it means the same as the domestic.

160 Q. What does it mean?

A. It is the product of the mine in its raw state, briefly stated. Possibly they take the rock out.

Q. Containing what?

A. Containing certain units of metallic iron, oxygen, silica, phosphoros, perhaps lime—no end of ingredients—fifteen or twenty.

Q. How about water?

A. Water both chemically and mechanically.

Judge BUTLER: You did not ask him the direct question, What is the signification of iron ore as applied to this particular iron ore.

Q. The importation of the iron ore in this suit that you heard spoken of here is from Camerata, from Carthagena, and the Porman ores. Now, will you please state what is the designation as to those ores—the trade designation?

Judge BUTLER: What does the term "iron ore" signify in commerce when applied to those ores?

Mr. HALL: Has this witness any experience in ores of this character?

Judge BUTLER: You have the opportunity of ascertaining that now.

By Mr. HALL:

Q. Have you had any experience in buying and selling

161 ores from Porman?

A. Not in buying and selling, but in coming in contact with them and being familiar with the ore.

Q. Do you know what these ores are?

A. I know them by sight, as a rule.

By the DISTRICT ATTORNEY:

Q. You know them when you see them?

A. Yes, sir; I know that they yield.

Cross-examination:

Q. Describe this Porman ore. What is it like?

A. The Porman ore is a soft ore, and I should say that it runs from about fifty-three to fifty-five per cent.—a distinction from the Marbello. It is partly a magnetic ore and runs about sixty per cent.

Q. What is the character of this Porman ore as to moisture?

A. It is somewhat similar to the hematites. It absorbs the same amount of moisture.

By Judge BUTLER:

Q. What does the term "iron ore" signify as applied to those particular ores?

A. The same as signified by domestic ores with corresponding consistency with the water contained. The Porman ore should be classed as a soft hematite.

162 Q. And the term "iron ore" as applied to ores of this character includes and means the same thing as when used generally?

A. Yes, sir.

Q. Covering the water as well as all foreign ingredients?

A. Yes, sir; there is no difference between a foreign and domestic ore of the same class.

By Mr. HALL:

Q. You understand iron ore to be the natural product as it comes from the mouth of the mine?

A. Or delivered at the mouth of the furnace. I think that is a better term to use to describe it. It is immaterial.

Q. Do you consider that this water which soaked up by these spongy ores a part of the ore after it has come out of the mine?

A. In a sense; yes, sir.

Q. Is there any more ore in a pile afte- it has been wet than there is after it is dried?

A. No more ore.

Q. Can you get any more for it? Is it worth any more to buy and sell? Suppose you have two piles of ore, each weighing 900 tons, and one is wet so that it weighs 1,000 tons and the other

163 is kept under cover and has not gotten wet, is the one that weighs 1,000 tons—is there any more ore in it for commercial purposes than in the pile that weighs 900 tons?

A. Do you refer to the same amount of ore, selecting 1,000 tons of ore?

Q. We have two piles. Here is a pile that weighs 900 tons. This pile is under cover and is kept dry. The other pile is outside and exposed to the rain. This pile that is under cover is kept dry and the one that is exposed to the rain, by virtue of that rain, weighs 1,000 tons. Is the dry pile, weighing 900 tons, any more valuable for commercial purposes than the pile that weighs 1,000 tons, or is there any more ore in it for commercial purposes than the one that has been exposed to the wet and weighs 1,000 tons?

A. There may be no more intrinsic metallic iron, but at the same time it may still be more.

Q. How?

A. It would depend upon the custom of sale.

Q. Do you mean to say that if you had in two sheds in the same yard two piles of ore that you put in there to-day, and each weighed 900 tons, and one was sheltered from the rain and the other was exposed to the rain, and the one that was exposed to the

164 rain in six weeks of time, by virtue of the moisture absorbed,

weighed 1,000 tons—do you mean to say that there is any more ore in the 1,000-tons pile than in the 900?

A. If you are selling by the ton there would be.

Q. Do you mean to say that a man would give any more for the 1,000-ton pile than for the 900-ton pile?

A. If he was buying by the ton and not by the unit he would.

Judge BUTLER: He said that the intrinsic value of the piles would be the same. It would be just the same amount of metal in each pile.

Q. But the man who bought the 900 tons dried would pay a higher price for it per ton than he would in buying the 1,000 tons weight, would he not?

A. It depends entirely, as I said before, on the way it is sold.

Q. There isn't any more ore in the one than in the other?

A. There is in tons. I don't think we quite understand each other. I am supposing two cases, and you——

Q. Let me suppose the case. You have here in a yard in one pile 900 tons of ore, and it is put in under a shed, and the same day, right along side of it, outside and exposed to the rain, is another pile weighing 900 tons, and they stay there for three weeks,
165 and the one exposed to the moisture is rained upon and at the end of three weeks weighs 1,000 tons. Now, what I want to ask you is, is there any more ore for commercial purposes in the pile outside which weighs 1,000 tons than there is in the pile inside which weighs 900 tons?

A. There is no difference in the metallic unit.

Judge BUTLER: That is an answer. There is no more commercial value, but he calls both piles ore; but he said they are of the same intrinsic value; that, of course, the one contains as much metal as the other.

Mr. HALL: I understand the witness leaves it that there is no more value in the 900 tons dried than in the 1,000 tons wet.

The WITNESS: If by the unit.

Q. In three weeks by rain an amount is added of 100 tons, which is the ore heap with the water?

A. That is hardly a case. It might not exist.

Judge BUTLER: What is the question?

Mr. HALL: The rain in three weeks has added to this ore heap 100 tons in water.

Judge BUTLER: That is it. In other words, the elements have done it for him.

166 Q. And that 100 tons which has been added to that ore heap is water and it is not ore, is it?

Judge BUTLER: He has not stated that. Are both heaps called ores in trade, just as they stand?

The WITNESS: Yes, sir; one as much as the other.

The COURT:

Q. I suppose it follows, however, that a person purchasing would not pay as much per ton for this soaked ore as he would for ore entirely dry?

A. That would depend on how he bought it.

Q. If he bought wisely, so much a ton, would he pay as much for the soaked ore as for the other; wouldn't he pay a different price?

A. He would pay as much unless he knew the difference.

Q. Of course, if he knew the difference.

A. Yes, sir.

LOUIS E. STANTON sworn and examined:

Q. What business are you engaged in?

A. Pig-iron and iron ores, with Crocker Brothers, New York.

Q. What is the amount of their dealings in iron ore per year?

A. We don't buy and sell foreign ore, we sell American ore.

167 We buy foreign ore as it may be necessary for American firms whom we represent.

Q. What amount of foreign ore have you been in the habit of buying for your customers within the last four or five years?

A. The amount varies. Within the last two or three years not as large as two or three years before. I suppose during the last two or three years we bought fifty thousand tons in rough.

Mr. HALL: Does your experience go back to 1883?

The WITNESS: Yes, sir.

Q. What kind of foreign ores have you dealt in?

A. We have purchased pretty much all the different varieties from pretty much all the mines at different times. Of late years we have bought more of the Meta Vectia ores, but we have bought all the different ores.

Q. What is the custom as to dealing in these foreign ores? Is it universal that there is a contract stipulating for an allowance for moisture, or do the transactions vary in that particular?

A. In our experience they vary very much. We have bought both ways.

Q. You mean bought by the ton?

A. And by the unit of iron.

168 Q. I suppose the proportion varies in different years, does it not?

A. Yes; as the negotiations may happen to have varied.

Q. What is the proportion now?

A. During the last two years we have bought much more ore by the ton than we have bought by the unit.

Q. As I understand you, then, the greater part of the foreign ore that you have purchased within the last year or two you have purchased by the ton without regard to the moisture contained in it?

A. Yes, sir.

Q. And your house varies in its transactions—that is, some por-

tions of it are bought by the unit, allowing for moisture, and the other is bought by the ton as bought and sold in this country?

A. Yes, sir. Of course, the thing we are looking at is the result in the pig-iron; the use in the furnace.

Q. In either case what is the commodity called that you deal in?

A. Iron ore.

Judge BUTLER: As it comes over the side of the ship?

The WITNESS: Yes, sir.

Q. In either case it is called iron ore?

A. Yes, sir.

Q. Is there any such commodity known to the people who
169 deal in it as dried iron ore?

A. No, sir.

Cross-examination:

Q. From whom have you made these purchases of iron ore that you speak of?

A. First and last from all the different houses—Earnshaw, Naylor & Co., Read & Co., Latassa & Co., and R. D. Flores.

Q. You have bought from Latassa & Co. and from D. W. R. Read?

A. We did; yes, sir; but they failed.

Q. And Earnshaw?

A. Yes, sir.

Q. And Naylor & Co.?

A. Yes, sir.

Q. And who else?

A. And R. D. Flores it was. It is now R. D. Flores & Co.

Q. Where do they do business?

A. In New York.

Q. In these purchases and sales wasn't an allowance made for the moisture?

A. When bought by the unit, which is the same thing. When bought by the ton there was no allowance.

Q. What proportion was bought by the ton without allowance for moisture?

170 A. Very roughly for the last two and a half years I should say fully seventy per cent. of all our purchases have been made by the ton.

Q. Do you mean by the unit or by the ton?

A. By the ton—of all of our purchases.

Q. How much did those purchases cover?

A. I said in rough 40,000 to 50,000 tons.

Q. In how many years?

A. I am speaking now of about two years. We have bought foreign ores ever since 1879.

Q. That is about 10,000 tons a year?

A. It varies very much, according as our different firms wished it.

Q. Previous to that time how did you buy this iron ore?

A. Both ways. We began in 1879 buying entirely at a specific

price. I think the first purchase that we ever made by the unit was in the latter part of 1880.

Q. And there was an allowance for moisture?

A. That was by the unit.

Q. There was an allowance for moisture?

A. That is the same thing—when the unit is determined at 212 degrees.

The DISTRICT ATTORNEY: It don't necessarily mean that?

The WITNESS: Not at all. If the unit is determined at
171 212 degrees, then the moisture is deducted from the Government weights. If the unit is determined in the natural condition it is not determined that way.

Q. In determin-g the unit the moisture is deducted from the analysis—that is, in the dry ore you would have 60 units. For instance, suppose we had a cargo of 1,000 tons with ten per cent. moisture and it was worth ten cents a unit and the ore showed, dried, 60 per cent. or iron, then you would have 60 units in the dry ton?

A. Yes, sir.

Q. And it would be worth $6 a ton?

A. Yes, sir.

Q. And if, however, the moisture was deducted from the analysis you would only have 54 units?

A. In the natural condition of the ore, yes, sir.

Q. That would be $5.40 per ton?

A. Yes, sir; but there would be just as many tons.

Q. In getting at the 54 per cent. you take the moisture from the 60 per cent. of iron which is in the number of units?

A. You take the percentage which the water bears to the ton of ore, and then, leaving that out, of course, you have that much more iron.

Q. That is, you deduct the moisture from the 60 per cent. of
172 metallic iron that you have in the dry ton and it leaves 54 per cent. of metallic iron in the wet ton?

A. In the amount of metallic iron in the dry ore and the amount of moisture, of course, you figure at once what the amount of metallic ore in the natural condition is.

Q. So that 60 per cent. of the metallic iron in the dry ore is the same as the 54 per cent. of metallic iron in the natural ore?

A. Yes, sir; assuming that there is ten per cent. moisture.

Q. But the result that you arrive at is to deduct from the percentage of iron in the dry state what represents the moisture in the whole cargo, and you get 54 per cent.?

A. The result is that you pay for the cargo exactly the same amount of money.

Q. Only in one case the moisture is taken off the weight, and in the other case the moisture is taken off the analysis?

A. One goes in settling in deducting from the Government weight; the result-, of course, are the same.

Q. What purchase have you ever made from Latassa & Co.? Were those made with an allowance for moisture?

A. My remembrance is that all our purchases from La-
173 tassa or nearly all were at a specific price per ton without any allowance for moisture.

Q. A specific price per ton with no allowance for moisture?

A. Yes, sir. The ore, of course, was supposed to be of a standard quality.

Q. It was a specific price per ton? If it came to 1,000 tons and the price was $6 a ton, you paid $6,000 for the 1,000 tons?

A. Yes, sir.

Q. And no metallic guarantee?

A. I forget, exactly. The general tenor of all our contracts was that they always guaranteed a standard quality. We knew about what we would get. If the ore was of an exceptionally bad quality we had the same claim that anybody would have for goods that ran poorly.

Q. You are quite sure about these purchases from Latassa & Co., that it was a specific price per ton without any allowance whatever for moisture?

A. Yes; I have a memorandum which I can consult if your wich it in detail.

Q. Take D. W. R. Read & Co. How did you buy of them?

A. The last purchase we made of them the ore was not delivered, and they subsequently failed. My remembrance is that most
174 of the purchases from Read was at a specific price with no allowance for moisture. I think we made one contract by the unit.

Q. And you are quite sure about it, in regard to Mr. Read, that the purchases were at a specific price for the amount of ore without any allowance for moisture?

A. That is my remembrance. I can consult some papers to make sure if you wish.

Q. How did you buy it from Naylor & Co.?

A. Our purchases from Naylor & Co. have been by the unit.

Q. With an allowance for moisture?

A. Of course. By the unit covers the entire ground.

Q. When you buy by the unit there is an allowance for moisture?

A. Certainly; on the analysis at 212.

Q. Did you buy any from Earnshaw?

A. Yes, sir; but not recently.

Q. How was that bought?

A. All our recent purchases from Mr. Earnshaw were by the unit, but they are not very recent.

Redirect examination:

Q. The purchases that you made from Mr. Earnshaw and
175 from Naylor were put in the form of a special contract, were they not?

A. Yes, sir.

Q. There was a special stipulation?

A. We have not bought any from Mr. Earnshaw in so long that I don't remember all the details. We have not bought anything

from Naylor & Co. for, I think, a couple of years. Those are in the form of a specific contract.

Q. In which the stipulation was——

A. It was a regular printed contract.

Q. And the analysis made subject to a test of 212?

A. Yes, sir; I should say that that was bought for one of our furnaces. In one case the contract was made by the foreman.

By Mr. HALL:

Q. In buying and selling this ore it was by a note, just as you buy pig-iron; no special contract?

A. Our recent purchases have been from various persons. In our recent purchase a letter was written that it was to be of a good, substantial quality—our purchases for the last year or so.

Judge BUTLER: It may be noted that the exception taken to the evidence by Mr. Hall respecting domestic ore extends to and covers all subsequent testimony on that subject.

176 GEORGE H. ELY, of Cleveland, Ohio, for 25 or 30 years a dealer in iron ore, testified:

Q. What companies are you connected with?

A. I have sold the Champion ore, the Washington ore, and the Minnesota ore.

Q. And to what extent are you interested in your business—the producing of ores?

A. I cannot give you the figures of those companies, but the four Lake Superior districts last year sent into the trade 4,738,000 tons.

Q. What office do you hold in the American Iron Association?

A. I am a member of the Iron and Steel Association, but I am president of the Western Iron Ore Association, which takes in the ore production of Minnesota, Wisconsin, Michigan, and Missouri.

Q. Are you or not familiar with the trade designations, the trade usages and customs of the dealers in imported ores?

A. I have never bought or sold any imported ore, but in my f-nctions and relations as president of the ore association and an agent of these companies for which I have sold ores it was my duty to be informed as to all the usages and practices in the sales of all ore, domestic and foreign.

177 Q. Is there or not such a com-odity among the dealers of imported ores known as dried iron ore, which is bought, sold, used, and delivered under that designation?

A. I never heard of such a thing as d-ied iron ore as an article of commerce.

Q. Is there such a commodity among dealers in foreign iron ore as iron ore?

A. Yes, sir.

Q. What does that mean?

A. As I understand, it means precisely what it means in domestic production—the article that is produced at the mine in the condition ready to ship to the consumer.

Q. And as to water, what about it?

Plaintiff objects. Objection overruled. Exception noted.

A. Why, in the domestic production and trade and transportation there is never any allowance for water.

Q. How is it in the foreign ore?

A. I first heard of an allowance for water, I think, two years ago now, when the Secretary of the Treasury decided that iron ore might be made dutiable after becoming moist.

Q. The ores involved in this suit are the Carthagenia,
178 Camerata, and the Porman ores. What is the trade meaning of the term iron ores in connection with those ores?

A. I can give no testimony in relation to those particular ores. I am familiar with quite a variety of foreign ores.

Judge BUTLER: Take ores of the same character you have here, as they are described, soft or fine ores. What does the term "iron ore" mean as applied to these ores?

The WITNESS: It means iron ore ready for market, including all its constituents—moisture or water in mechanical or chemical combination, silica, alumina, phosphorous, and whatever else may be in it—three or four other constituents.

Q. Oxygen?

A. Yes, sir.

Cross-examination:

Q. In buying and selling domestic iron ore where is it weighed?

A. I cannot give you any better description than to begin at the mine—to give you our process. The ore is mined, four-fifths of it, by the ton, the balance of it by the laborer at day labor. It is brought to the surface, and, for transportation purposes, to the
179 water—the upper lakes. It is weighed for transportation on the railroad and for the vessel transportation. It is then brought down to the lower lake docks. There are six or eight of them on Lake Erie. If I sell 20,000 or 50,000 tons to A B it is for his total year's production. It goes on the docks and he takes it.

Q. Where is the ore weighed? I understand that you sell ore?

A. Yes, sir.

Q. Where is the ore weighed on the weight of which the buyer pays?

A. If the furnace is on a lake-port dock its weight is taken, which is a very seldom thing, at that furnace. If it is sold to go into the trade it is the weight of the railroad that transports it, and that is the weight taken by the buyer and seller.

Q. Where is the railroad yard? Is it by your mines? You ship it on the cars?

A. These mines are from 50 to 150 miles from the lake. There is a railroad that brings it to the lake; then it comes on the vessel down to Lake Erie, and there — eight or ten ports there at which the ore is docked. Now, I say that nineteen-twentieths of that ore is taken from the lake-port docks by the different railroads. There are ten railroads.

Judge BUTLER: Where is the bulk of it weighed out to the
180 purchaser?

A. At these railroad docks.

Q. Near your mines?

A. No, sir; at the foot of Lake Erie.

Q. How far is that from your mines?

A. In some cases 600 miles and in others 850 or 1,000 miles.

Q. And that is where it is weighed?

A. The final weight between the buyer and seller is at the ports on the south side of Lake Erie.

Q. And how is the ore transported there? In cars to the lake and then on a boat to the docks—is it?

A. It is first transported from the mines to the lake ports. There it is put on the vessels and brought down the lake and landed at the ports on Lake Erie. Some of it goes to Chicago.

Q. What is the character which your mine?

A. Well, it is hard and soft. I should say out of 4,730,000 tons mined last year, in the first place, the Marquette district produced 1,800,000 tons. I should say one-third of that.

Judge BUTLER: You should say what?

The WITNESS: I should guess, and I should be within the figures, if I should say that three-fifths of the total or Lake Superior production last year was fine or soft ore.

181 Q. You never had any experience in buying and selling foreign ore?

A. No, sir; I never bought or sold any foreign ore.

Q. How much will the moisture vary in ores with which you are familiar—this mechanical moisture that is not chemically combined with the ore?

A. I am rather at sea on that, but I should say from one to twelve or fifteen per cent.

Q. That is, you have to deal with pretty variable ores?

A. Yes, sir.

Q. What causes this variation?

A. There is always moisture in the ore as it lies in the bed before it is touched. It is moist when it goes on the vessel. This Lake Superior production lies on the docks the whole year round. It is subject to all atmospheric conditions. You cannot box up iron ore as you would a bale of goods. It is just like coal. It is handled and transported, subject to every condition of the atmosphere. I say that ore lies on the docks at Cleveland all the year. It is taken away from the docks at the pleasure of the purchaser.

Q. Is this ore which comes from your mines wet when it comes out of the mines?

A. I can't say it is wet, but it is moist. All ore is.

182 Q. How much per cent. of moisture would it contain?

A. I have said from one to twelve or fifteen per cent. Do you mean how much moisture does it contain in the mine or at the mine?

Q. As it comes out of the mine.

A. I couldn't say as it comes out of the mine. There is so large

a per cent. I can't tell you how much; but it is always moist, and of course a large number of the mines, when mining is deep, have pumping machinery for pumping out a large amount of the moisture.

Q. But the ore when it comes to the surface is wet, isn't it?

A. I said it was moist, and sometimes is wet.

Q. It contains a considerable per cent. of moisture, doesn't it?

A. Yes, sir.

Redirect examination:

Q. You spoke of making these sales by the ton. You mean the weight of 2,240 pounds?

A. Yes, sir.

183 *John M. Hartman.*

Q. What is your business?

A. Constructing engineer and operating a blast furnace for producing pig-iron for 23 years.

Q. In this State?

A. Yes; and other States. Our operations are not confined to this State.

Q. You are familiar with blasting furnaces?

A. Yes, sir.

Q. And the production of pig-iron?

A. Yes, sir.

Q. Now, as a matter of fact, when a blast furnace is to be charged with ore for the making of pig-iron is it charged with it at 2,240 pounds as a ton of iron ore, or is it charged with it with an allowance for moisture?

Plaintiff's objection overruled. Exception noted.

A. There is an allowance made for moisture. *Is it* taken in its natural state, as it is dumped in the stock-house, and so weighed and charged into the furnace.

Q. Do you know anything about these foreign ores?

A. Only what I have seen at the different furnaces that we have been in, and I have seen it loaded over the side of the vessel; also the analysis, the same as we have to take—those analysis in

184 proportioning our charges.

Q. Is there any difference in the foreign ores as you have heard described in this case from that of the domestic ores?

A. There is none.

Q. They are all charged alike and treated alike?

A. Yes, sir.

Q. And is the question of an allowance for moisture considered at all in charging the furnace?

A. No, sir.

Q. Do you know of any difference between the iron ores of Europe and the iron ores of this country so far as their commercial designation is concerned?

A. No, sir; there is none.

Cross-examination:

Q. Did you ever buy and sell any foreign iron ore?
A. No, sir.
Q. Did you ever buy and sell any domestic ore?
A. No, sir.

Defendant closes.

185 Upon the case thus presented and certain rulings asked for the judge charged the jury, so much of the rulings and charge as are material and were excepted to being as follows:

I first address myself to the plaintiff's points, the first of which reads as follows:

"The term iron ore, in its ordinary meaning, does not include water which is mechanically present and not chemically combined with the ore."

We disaffirm this.

The fourth point reads as follows:

"If iron ore as imported into the United States is generally bought and sold on the basis that the water which is only mechanically present and not chemically united with the constituents of the ore should be removed, and the usual mode to remove such moisture to ascertain this basis and determine the true ore is by drying at 212 degrees Fahrenheit, that course should be adopted to determine what is dutiable iron ore under the tariff."

We must disaffirm this. There is no evidence to warrant a finding that the iron ore in question "is generally bought and sold on the basis that the water which is only mechanically pres-
186 ent should be removed," except where this basis is stipulated for by special contract. Such transactions (founded on contract) are unimportant in the consideration of this case standing alone.

The sixth point reads as follows:

"If upon the whole evidence you are in doubt whether the iron ore of commerce is iron ore free from water, not chemically combined with it, it is your duty to give the importers, the plaintiffs in these cases, the benefit of the doubt, and your verdict should be for the plaintiffs."

This is also disaffirmed. The question must be decided according to the weight of the evidence.

Having answered the points presented by the parties, I now pass to the general charge, which is very brief.

By the statute of 1883, relating to duties on foreign imports, iron ore imported from abroad is subjected to a duty of 75 cts. per ton.

In the years 1886 and 1887 the plaintiffs imported several cargoes of ore on which this duty was imposed. After protest and appeal they paid it, and now sue to recover a part back on the allegation that the water contained in the mass, as weighed, should have been excluded from the calculation.

The term "iron ore," as defined by lexicographers and
187 used and understood in commerce generally, includes the water as well as other foreign substances held in combination with iron, whether the combination be chemical or physical. It follows, therefore, that the duty imposed and complained of here was properly imposed, unless a distinction is to be drawn between this ore and iron ore generally.

The plaintiffs contend that such a distinction must be drawn; that this ore is peculiar, in that it absorbs a large quantity of water when exposed to rain or moist atmosphere which is held in mechanical combination simply and given off under any drying process to which the ore may be subjected, so that its weight varies largely from time to time, and that in consequence of this peculiarity it is dealt in upon the basis of excluding the water; that it quoted to purchasers as dry, and so bid for and bought, and that the term "iron ore," as applied to this particular ore, signifies, to those dealing in it and familiar with the subject, dry ore; that such is the common, well-understood signification of the term when so applied.

In the enactment of tariff statutes Congress must be understood, when employing terms to describe articles of commerce, to employ them in the sense in which they are commercially understood and employed by persons dealing in such articles and familiar
188 with the subject—in other words, as they are understood and employed in the commerce to which they relate.

If, therefore, the plaintiff has proved that the term "iron ore" when applied to the imported ore here in question signifies to those dealing in it and familiar with the subject dry ore only—that is, ore from which the water has been extracted—this signification must be given to the term as applied to this ore.

To warrant this construction, however, the evidence must satisfy you that the term has this signification generally—that is, habitually, commonly—in the commerce respecting this ore, so as to be obligatory upon parties dealing in the ore without special contract on the subject.

Does the evidence satisfy you that it has? Looking at the question in the light of the plaintiff's testimony alone (in the first instance), is the existence of this signification, under the circumstances stated, proved?

Their witnesses when first examined went little further than to say that in buying and selling and dealing generally in this ore parties act upon the understanding that the ore is dry; in other words, that the water is excluded from the weight. They further say, however, that special contracts are entered into respecting it generally, if not always, whereby the rights of purchasers to have the water so excluded is secured.

189 If the case had rested here, as it did when the plaintiffs first closed their testimony and the defendant moved for a nonsuit, the court would, as it intimated, have held that the evidence was insufficient to justify a finding in the plaintiffs' favor. The evidence seemed to show no more that a course or custom of

dealing by express contract respecting this ore, which, standing alone, should have no influence in ascertaining the signification of the term in question as applied to it. Subsequently the plaintiff called these witnesses back and inquired of them, "What is the term 'iron ore' understood to mean commercially among importers and dealers in imported ore?" In other words, What is the iron ore of commerce—imported ore? And the witnesses answered, substantially, that it is understood to be ore without the water; dry ore. The witnesses repeat their former testimony respecting the custom or habit of dealing in the ore—that parties proceed upon the understanding that the water is to be excluded, and that their contracts contain a stipulation securing its exclusion. There were three or four witnesses, very intelligent men, called back, who thus testified respecting the signification of the term as applied to this ore. This testimony, in terms, at least, seemed to have a broader scope than that previously heard, and to warrant a submission of the question to you.

190 In considering it, however, you must bear in mind what these witnesses said when first examined, as well as subsequently, and inquire whether their testimony thus taken altogether shows more than a course or custom of dealing in which parties habitually contract by special provision for the exclusion of water for dry ore. If it shows no more than this, it is of no value. To sustain the plaintiff's case the testimony must show, as before stated, that the term "iron ore," as applied to the ore in question, signifies to persons familiar with the commerce respecting it dry ore only; that this is the common, well known and recognized signification of the term, when so applied, upon which signification parties buying and selling or otherwise dealing in the ore have a clear right to depend, without any contract or stipulation respecting it.

Does the plaintiff's testimony, even when considered alone, show that the term so applied has this signification? In determining this it is important to remember that parties dealing in the ore, according to the plaintiff's testimony, do not seem to rely alone upon the existence of this signification in dealing, but resort to contract for excluding the water. Neither you nor the court can overlook the fact that this manner of dealing by special contract seems to

191 be inconsistent with the alleged existence of a common, well-understood signification of the term "iron ore," such as is here set up.

I have thus called your attention to the question in the light of the plaintiff's testimony alone. It is not to be decided, however, without considering as well the testimony produced by the defendant. The Government has called several witnesses—a larger number than were called by the plaintiffs, and equally intelligent, apparently—who say in substance that they are familiar with the ore in question, several of them being dealers in it, and that the signification of the term "iron ore," as applied to it, includes the water, as well as everything else contained in the mass, just as the term does when applied to any other description of iron ore; that there is no such commodity known to commerce as dry iron ore; that while

the soft foreign ore is sometimes bought with the water excluded, it is also bought without respect to the water, and all other iron ore is bought, and that when it is so bought with the water excluded this is always specially provided by the terms ores as when applied to hard and all other descriptions of ore.

Now, you must determine, from all the evidence in the case, whether it is proved that the term iron ore, when applied to the description of imported ore here involved, has the limited sig-
192 nification attributed to it by the plaintiffs—that is, that it signifies dry ore—ore with the water excluded. If you find it has this signification generally, commonly, when so applied, your verdict will be for the plaintiff for the amounts claimed. Otherwise your verdict will be for the defendant.

To the various rulings of the court on the admission and e-clusion of evidence during the trial objected to by the plaintiff, as hereinbefore set forth, the plaintiff then and there excepted.

To the refusal of the court to give the instructions requested by the plaintiff in the first, fourth, and sixth points presented by him, and the court's rulings thereon, the plaintiff then and there excepted.

To the charge of the court, given in following language: "The term iron ore, as defined by lexicogr*pa*hers and used and understood in commerce generally, includes the water as well as other foreign substances held in combination with iron, whether the combination be chemical or physical. It follows, therefore, that the duty imposed and complained of here was properly imposed, unless a distinction is to be drawn between this ore and iron generally," the plaintiff then and there excepted.

And inasmuch as the opinions, rulings, and charges of
193 court excepted to do not appear upon the record—

The said counsel for the said J. W. S. Earnshaw did then and there tender this bill of exceptions to opinions, rulings, and charge of the said court, and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did set his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this eighth day of January, A. D. 1889.

WM. BUTLER. [SEAL.]

Endorsed: No. 61. October sess., 1887. Circuit court U. S., E. D. of Pa. Earnshaw *vs.* Cadwalader, collector. Bill of exceptions. Presented and filed Jan. 8, 1889. Samuel Bell, clerk.

194 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN W. S. EARNSHAW
vs.
JOHN CADWALADER, Collector of Customs for the District of Philadelphia. } No. 61. October Sess., 1887.

Know all men by these presents that we, John W. S. Earnshaw, residing at Philadelphia, as principal, and American Surety Company, are held and firmly bound unto John Cadwalader, collector of customs for the district of Philadelphia, in the full and just sum of fifteen hundred dollars, to be paid to the said John Cadwalader, collector of customs for the district of Philadelphia, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of February, A. D. 1889.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between John W. S. Earnshaw, plaintiff, and John Cadwalader, collector of customs for the district of Philadelphia, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
195 said defendant, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said John W. S. Earnshaw shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. S. EARNSHAW. [SEAL.]
AMERICAN SURETY COMPANY,
By HENRY D. WELSH, *Vice-President.*

Attest: STEPHEN W. WHITE,
Ass't Secretary. [SEAL OF CO.]

Sealed and delivered in presence of—
—— ——.

Surety approved.
WM. BUTLER, *Judge.*

[Endorsed:] No. 61. October sess., 1887. Circuit court United States. Earnshaw *vs.* Cadwalader, collector, &c. Bond surwrit of error. Filed Mar. 1, 1889.

196 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John W. S. Earnshaw *vs.* John Cadwalader, collector of customs for the district of Philadelphia, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 13,531. E. Pennsylvania C. C. U. S. No. 348. John W. S. Earnshaw, plaintiff in error, *vs.* John Cadwalader, collector of customs for the district of Philadelphia. Filed April 6, 1889.

JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 348.

JOHN W. S. EARNSHAW,

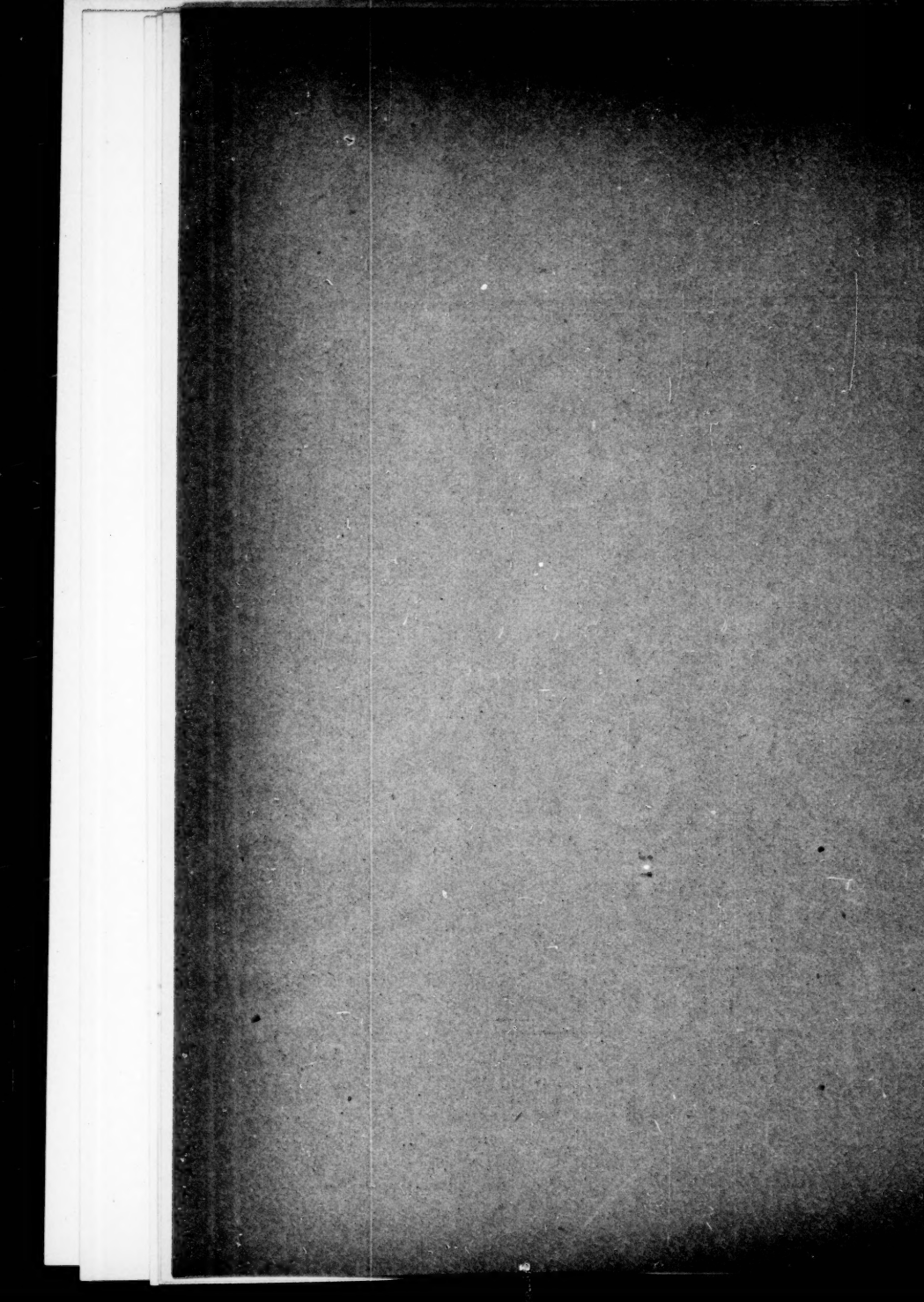
PLAINTIFF IN ERROR,

v.

JOHN CADWALADER,

COLLECTOR.

BRIEF FOR PLAINTIFF IN ERROR.



Supreme Court of the United States.

NO. 348.

JOHN W. S. EARNSHAW

v.

JOHN CADWALADER, *Collector.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action brought against the collector of the port of Philadelphia, to recover an amount of customs duties alleged to have been wrongfully exacted of the plaintiff by him upon certain cargoes of iron ore imported by the plaintiff into the port of Philadelphia from Porman, Spain, and was one of two actions against the same defendant, which involved the same issue and were tried together, the other action covering importations of iron ore from Camarata, Africa. The writ was dated Jan. 20, 1888.

After a trial before a jury, there was a verdict for the defendant and judgment thereon, to reverse which, this writ of error is prosecuted.

The question involved is, whether water which is mechanically present and not chemically combined with the ore is subject to duty as iron ore.

By act of March 3, 1883, Chap. 121, § 6, Schedule C. 22 Stat. 497, iron ore is subject to a duty of seventy-five cents per ton.

The plaintiff introduced evidence tending to show that the cargoes of iron ore imported by him contained water, mechanically present simply, and not chemically combined with the ore, and claimed that this water was not subject to duty as iron ore. No issue was made on the evidence as to the amount of this water, or its method of ascertainment, which is, to take samples representative of the whole mass, and dry them at a heat of 212° Fahrenheit (boiling point of

water), which expels the water or moisture mechanically present, but has no effect upon the chemical ingredients of the ore.

The plaintiff asked the Court to rule that the term, "iron ore," in its ordinary meaning does not include water which is mechanically present and not chemically combined with the ore. The Court declined so to rule, and the plaintiff excepted.

The plaintiff further contended and introduced evidence tending to show that the term, "iron ore," as applied to imported iron ore, had at the time of the passage of the Act of 1883 a commercial designation among the importers who import it and our domestic traders who deal in it, which excludes the water held in mechanical combination; that dealers in imported iron ore do not consider water or moisture, which is mechanically present and not chemically combined, a part of the ore; that the iron ore of commerce, *i. e.*, that which was and is commercially understood to be iron ore among importers and traders in imported iron ore is dry ore to the exclusion of any water mechanically present: that the amount of this moisture can be practically determined by taking samples representative of the whole mass and subjecting them to a heat of 212° Fahrenheit, which expels the water mechanically present, but does not affect in any way the constituents of the ore, and that this method is a practical one and is actually used by buyers and sellers of imported ore in ascertaining the amount of ore, exclusive of water mechanically present, delivered and paid for.

The testimony of the plaintiff on this matter of commercial designation was confined to traders (importers and domestic dealers) in imported iron ore. The defendant offered to show by "witnesses from districts of the United States, including the New England district, the Eastern and Lake Champlain district, the Southern district, the South-west and Lake Superior districts, where iron ore is produced, as respects domestic ores, that in this country the meaning of the term, 'iron ore,' in commerce or trade, is the natural substance from the iron mine in its crude state, irrespective of the presence or absence of moisture or water." This evidence was objected to by the plaintiff, and the objection was sustained and the evidence excluded [page 39].

The defendant then limited the inquiry in regard to domestic ores

"to such as have the same characteristics as the ores in question in this suit," and the testimony was admitted as affecting "the weight and credibility of the testimony" of the plaintiff's witnesses as to the commercial signification of the term, "iron ore," as applied to imported ore [page 44]. To the admission of this evidence the plaintiff duly excepted.

The Court, in charging the jury, undertook to define iron ore in these words: "The term, 'iron ore,' as defined by lexicographers, and used and understood in commerce generally, includes the water as well as other foreign substances held in combination with iron, whether the combination be chemical or physical." To this part of the charge the plaintiff excepted [pages 82, 84].

The plaintiff asked the Court to rule: "If iron ore as imported into the United States is generally bought and sold on the basis that the water, which is only mechanically present and not chemically united with the constituents of the ore, should be removed, and the usual mode to remove such moisture to ascertain this basis and determine the true ore is by drying at 212° F., that course should be adopted to determine what is dutiable iron ore under the tariff." The Court refused so to rule and ruled, "There is no evidence to warrant a finding that the iron ore in question is generally bought and sold on the basis that the water, which is only mechanically present, should be removed except when this basis is stipulated for by special contract."

To this ruling and refusing to rule the plaintiff excepted [pages 81, 84].

Specification of the Errors Relied Upon.

1. The Court erred in refusing to rule that "The term 'iron ore,' in its ordinary meaning, does not include water which is mechanically present and not chemically combined with the ore" [pp. 81, 83.]

2. The Court erred in admitting evidence that the iron ores of this country, which resemble and are like and have the same characteristics of the iron ores in question in this suit, are dealt in in this country without an allowance for moisture [page 44].

3. The Court erred in charging the jury that, "The term 'iron ore,' as defined by lexicographers, and used and understood in commerce,

generally includes the water as well as other foreign substances held in combination with iron whether the combination be chemical or physical. It follows, therefore, that the duty imposed and complained of here was properly imposed, unless a distinction is to be drawn between this ore and iron ore generally." [Page 84.]

4. The Court erred in refusing to give the ruling requested by plaintiff: "If iron ore as imported into the United States is generally bought and sold on the basis that the water, which is only mechanically present and not chemically united with the constituents of the ore, should be removed and the usual mode to remove such moisture to ascertain this basis and determine the true ore is by drying at 212° Fahrenheit, that course should be adopted to determine what is dutiable iron ore under the tariff"; and charging the jury: "There is no evidence to warrant a finding that the iron ore in question is generally bought and sold on the basis that the water which is only mechanically present should be removed except when this basis is stipulated for by special contract. Such transactions (founded on contract) are unimportant in the consideration of this case standing alone" [page 81].

5. The Court erred in refusing to rule "If upon the whole evidence you are in doubt whether the iron ore of commerce is iron ore free from water, not chemically combined with it, it is your duty to give the importers, the plaintiffs in these cases, the benefit of the doubt, and your verdict should be for the plaintiffs" [pages 81, 84].

Brief of the Argument.

I.

The term, "iron ore," in its ordinary meaning, does not include water which is mechanically present and not chemically combined with the ore.

Evidence was introduced by the plaintiff in regard to the nature and character of this water, so mechanically present and not chemically combined, which was not contradicted, and tended to show:

That the amount of water, mechanically present and not chemically combined, in iron ores like those in suit, is variable and accidental, and varies in ores which come from the same mine, the chemical ingredients of which remain practically constant [page 8,

page 15], according as the ore has been subjected to rain, or exposure of some sort to the elements [page 8];

That the amount of this water, thus mechanically present, will vary from a few hundredths of one per cent up to twelve, sixteen, and twenty-five per cent [page 10, page 15, page 34];

That this variation is due to rain, or exposure of some sort to the elements [page 8], to the mechanical absorption of water [page 15], and varies very much in the season or the weather to which it has been subjected [page 36];

That practically all the moisture [water mechanically present and not chemically combined] would dry out of the iron ore if exposed to the sun long enough; that all the moisture — accidental moisture — would dry out in the sun, so that the ore would be just as dry as it possibly could be [page 43]; that "it would evaporate just as a sponge would dry out" [page 12];

That from one of the cargoes of iron ore in suit, while lying exposed to the weather from the time of its arrival in July, 1886, until some time in the following September, eighty-five tons of this water evaporated [page 14];

That this water so mechanically present does not increase but diminishes the value of the ore [page 27];

That the ore, as it comes from the mines at Porman in dry weather, is as dry as dust [page 34];

That there is, in some ores, water which is in chemical combination with the constituents of the ore, and is not driven off or affected by a heat of 212° Fahrenheit, but would require a heat as high as 1,000° F. to do so [page 11].

The provisions of the Statute imposing a duty on iron ore, under which the duties in question were levied, are as follows:—

"Iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, seventy-five cents per ton." Act, March 3, 1883, Ch. 121, § 6, Sched. C. 22 Stat. 497.

The words, "iron ore," are words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law. As such they have already been interpreted by this Court in the case of Marvel *v.* Merritt.

In that case the Court, in the opinion delivered by Mr. Justice Matthews, adopts the definition given by Webster.

"Webster, in his dictionary, defines *ore* as the compound of a metal and some other substance, as oxygen, sulphur or arsenic, called its mineralizer, by which its properties are disguised or lost."

Marvel *v.* Merritt, 116 U. S. 11, 12.

It certainly cannot be claimed that water or moisture merely mechanically present, which would dry out if exposed to the sun, in any way mineralizes the metal or causes its properties to be disguised or lost.

Worcester, in his dictionary, defines ore as "a mineral body which is reduced to the metallic state by fire; a metal *chemically combined* with some mineralizing substance which completely disguises its usually recognized and useful properties."

This definition by its express terms excludes water unless chemically combined with the metal.

The water is worthless, in fact is worse than worthless, and is an injury to the metallurgical value of the ore [page 27].

It is an impurity which is mixed with, but is not a part of, the ore.

Take away any of the chemical constituents of the ore and you are taking away part of the ore, and the residuum will not be ore. Take away this mechanically mixed water and you have left the true ore free of an impurity.

It is no more part of the ore, as ore, than dirt clinging to potatoes is potatoes.

Rev. Stat. of the U. S. § 2,504. Sched. F. page 468, imposed a duty on potatoes.

"Potatoes: 15 cents per bushel."

Dirt clinging to the potato skins is not potatoes, and the government officials recognize it, and no duty is levied on dirt.

Synopsis of Decisions. Treas'y Dept. No. 5153 (1882).

Act of March 3, 1883, Chaps. 121–22, Stat. 513, imposed a duty on flaxseed.

"Linseed or flaxseed twenty cents per bushel."

An importation contained clay, sand and gravel to an average of four per cent.

It was held that the importer should only be required to pay duty upon the weight of the seed after ascertaining and deducting, with approximate accuracy, the quantity of such impurities.

Wright and Lawther Lead Co. *v.* Seeberger, Coll'r., 44 Fed., Rep. 258.

The treasury department recognizes that water, which has been absorbed by the ore on the voyage, is not to be included in the weight for duty.

Synopsis of Decisions. Treas'y Dept. 1886. No. 7520.

The word, "iron ore," has also received, in a subsequent statute, a legislative interpretation which shows that Congress did not consider the word, used alone as in the Act of 1883, broad enough to embrace water held in mechanical combination.

"If it can be gathered from a subsequent statute *in pari materia* what meaning the Legislature attached to the words of a former statute they will amount to a legislative declaration of its meaning and will govern the construction of the first statute."

United States *v.* Freeman, 3 How. 556, 565.

The Act of Oct. 1, 1890, Chap. 1244, Sched. C. 133, 26 Stat. 574, is as follows: —

"Iron ore, including manganiferous iron ore, also the dross of residuum from burnt pyrites, seventy-five cents per ton. Sulphur ore, as pyrites, or sulphuret of iron in its natural state, containing not more than three and one half per centum copper, seventy-five cents per ton: *Provided*, that ore containing more than two per centum of copper shall pay, in addition thereto, one half of one cent per pound for the copper contained therein: *Provided, also*, that sulphur ore, as pyrites, or sulphuret of iron in its natural state, containing in excess of twenty-five per centum of sulphur shall be free of duty, except on the copper contained therein, as above provided: *And provided further*, that in levying and collecting the duty on iron ore no deduction shall be made from the weight of the

ore on account of moisture which may be chemically or physically combined therewith."

"When one finds a proviso, the presumption is, that but for the proviso the enacting part of the section would have included the subject matter of the proviso."

Mullins *v.* Treasurer, 5 L. R. Q. B. Div. 170, 173.

"The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause."

Wayman *v.* Southard, 10 Wheaton, 1, 30.

"It takes out of the body of the enactment that which otherwise would be within it."

Savings Banks *v.* U. S., 19 Wallace, 227, 236.

By this proviso, Congress recognizes that the term, "iron ore," in the body of the enactment does not include water mechanically or physically present, and that an allowance in ascertaining the dutiable weight on the custom house scales should be made for it, and provides that this allowance shall not hereafter be made.

To ask to have the amount of water or moisture mechanically present ascertained by sample and test, is not unreasonable. The method is well known, easily applied, and actually used between buyers and sellers in this country.

Sample and analysis must be resorted to to ascertain the duty on iron pyrites, levied by the Act of 1883 and 1890.

Also on lead ores: —

"Lead ore and lead dross, one and one half cents per pound: *Provided*, That silver ore and all other ores containing lead shall pay a duty of one and one-half cents per pound on the lead contained therein, *according to sample and assay at the port of entry*."

Act 1890, Chap. 1,244, Sched. C. 199, 26 Stat. 581.

"Laws imposing duties are never to be construed beyond the natural import of the language." "Such Statutes are construed most strongly against the Governmet." Mr. Justice Story in

Adams *v.* Bancroft, 3 Sum. 384, 387.
U. S. *v.* Wigglesworth, 2 Story, 369, 374.

"If question were one of doubt, the doubt would be resolved in favor of the importer." Mr. Justice Blatchford in

Hartranft *v.* Wiegmann, 121 U. S. 609, 616.

II.

The Court erred in admitting evidence that the iron ores of this country, which resemble, and are like, and have the same characteristics of the iron ores in question, are dealt in in this country without an allowance for moisture.

"Tariff laws are made for the government of the importer. His business is regulated by them; and it is but reasonable that, like the language of marine policies, and the terms of the law merchant, supposed to be especially applicable to this class, these laws should be construed as universally understood by the importer and trader." — Justice Hunt, in Arthur *v.* Morrison, 96 U. S. 108, 110.

It is the understanding of "commercial men in our own ports"; "among traders and importers."

Arthur *v.* Cumming, 91 U. S. 362, 363.
Greenleaf *v.* Goodrich, 101 U. S. 278, 284.

It is *importers* who import the commodity which is taxed, and the *traders* who buy it of the importer and trade in it after it is imported.

They make the trade, the understanding of which, so far as the description and character of the articles enumerated in a tariff are concerned, Congress is presumed to have in view.

It is *imported* ore which is subject to duty, and it is the understanding of the trade in our ports in *that commodity* which fixes what that commodity is to be understood to be, and by which the business of importers and traders is regulated.

The trade in regard to a domestic commodity which is similar to the imported commodity, but which has arisen only in regard to dealings in that domestic commodity, can constitute no part of the trade or dealing with the imported commodity, where the understandings of the two trades differ.

A merchant buying imported iron ore in Philadelphia or New York is presumed to know the understanding among traders and importers dealing in that ore, and be presumed to make his contracts in the light of that understanding, but he certainly could not be presumed to know the understanding of dealers in regard to domestic ore as prevailing in Cleveland or Marquette.

The testimony of a hundred dealers in domestic ore as to their understanding of the term has no bearing on the credibility of one dealer in imported ore, who testifies as to the understanding of the term among traders in and importers of imported ore.

III.

The Court erred in charging the jury that "the term 'iron ore,' as defined by lexicographers and used and understood in commerce generally, includes the water as well as other foreign substances held in combination with iron, whether the combination be chemical or physical. It follows, therefore, that the duty imposed and complained of here was properly imposed, unless a distinction is to be drawn between this ore and iron ore generally."

1. The term "iron ore," as defined by lexicographers, does not include water not chemically combined, as shown under point I.

2. Whether, as used and understood in commerce generally, it included this water, covered the very question which the jury were to decide, viz.: the meaning of the term, "iron ore," as understood in the commerce of this country which deals in imported ores. It was not claimed that this water was not a part of the ore because these ores were different from iron ores generally, but because it was understood in the commerce of this country, which dealt in imported ore, that the water was not a part of the ore.

IV.

The Court erred in refusing to give the ruling requested by the plaintiff. "If iron ore as imported into the United States is generally bought and sold on the basis that the water, which is mechanically present and not chemically united with the constituents of the

ore, should be removed, and the usual mode to remove such moisture to ascertain this basis and determine the true ore is by drying at 212° Fahrenheit, that course should be adopted to determine what is dutiable iron ore under the tariff," and erred in charging the jury that "There is no evidence to warrant a finding that the iron ore in question is generally bought and sold on the basis that the water which is only mechanically present should be removed, except where this basis is stipulated for by special contract. Such transactions (founded on contract) are unimportant in the consideration of this case standing alone."

There was evidence to warrant a finding that imported iron ore is generally bought and sold on the basis that the water which is only mechanically present should be removed.

LUTHER S. BENT, vice-president and general manager of the Pennsylvania Steel Company, testified in regard to sales of imported ores that in buying and selling the question of moisture is left to a chemist, his determination to be final [page 15] and also testified [page 16]: —

"*Q.* In the settlement of these purchases how is the weight of the iron ore which you pay for ascertained?

"*A.* Paid by less the free moisture — the actual weight less the free moisture.

"*Q.* That is, you pay for the number of tons of ore that there are deducting this moisture?

"*A.* Yes, sir. . . .

"*Q.* If you went into the office of an iron-ore importer and were quoted a price on iron ore and nothing further was said, on what weight would you expect to pay?

"The COURT: According to the custom of the trade.

"*A.* I should expect to get the weight less the moisture.

"*Q.* Of course you understand that there is in some ores water which is chemically combined?

"*A.* Yes, sir.

"*Q.* But that you are not referring to?

"*A.* No, sir."

Again he testified [page 38]: —

"*Q.* If you contracted to have a thousand tons of iron ore delivered to you, would you understand that a thousand tons of dry ore or a thousand tons of wet ore would be a compliance with that contract? What would be the trade understanding?

"*A.* So far as my knowledge goes, they would expect a thousand tons less the moisture."

By DISTRICT ATTORNEY: —

"*Q.* And that, I presume, because of the contract between them and the seller.

"*A.* Of course it would be a contract."

By the COURT: —

"*Q.* Suppose there was nothing in the contract relating to the subject?

"*A.* I should claim it, sir, and in my judgment I would be right in claiming it by custom [page 38]."

WILLIAM W. THURSTON, President of the Bethlehem iron works, who, in the past four years, had purchased one million, five hundred thousand tons of imported ore, testified [page 29]: —

"*Q.* In buying and selling these imported ores, do dealers treat the water, which is merely mechanically present and not chemically combined, as part of the ore?

"*A.* No.

"*Q.* On what basis do you understand it is the custom of the trade to deal in buying and selling imported ore?

"*A.* We buy the ore dried, at 212° F."

He further testified [page 31]: —

"*Q.* Do I understand that if you have a contract for twenty thousand tons of ore, you understand that there should be delivered you, in compliance with that contract, twenty thousand tons of ore dried at 212° F.?

"*A.* I do.

"The COURT: But I understand the witness to say that to enable him to get the iron ore, the matter transferred to him by railroad may amount in weight to a very considerably greater sum.

"Mr. HALL: Certainly; that is what I mean.

"*Q.* That is, there might be on twenty thousand tons of the dry ore, iron ore, which was delivered to you in compliance with that contract, twenty-two thousand tons of actual material, on which you have to pay the freight.

"*A.* Yes, sir."

He also said [page 30] on cross examination: —

"*Q.* As a matter of fact, Mr. Thurston, when these transactions are made in foreign ore, are they the subject of a written or printed contract, or not?

"*A.* They are generally; not always."

CHARLES B. HOUSTON, Treasurer of Chester Rolling Mills, testified [page 25] : —

"*Q.* Do dealers in imported iron ore, in buying and selling iron, this iron ore, treat water, which is mechanically present and not chemically combined with the ore, as part of the ore?

"The WITNESS: They do not consider the water a part of the ore.

"*Q.* You do not treat the water as part of the ore, and, so far as you know, that is the universal custom of the trade?

"*A.* That is the universal custom of the trade, so far as I know.

"*Q.* And this was the custom in 1883?

"*A.* Yes, sir.

"*Q.* I will ask you, if you went into the office of a dealer in imported ore, and were quoted a price, and nothing further was said, on what basis would you understand that you and he were dealing, — on the basis of the ore from which the moisture had been excluded, or on the basis of the ore with the moisture in it? How would the trade understand it?

"The WITNESS: My knowledge of the trade would be that they would understand it to the exclusion of the water that is in the ore, if nothing was said.

"*Q.* Have you made many transactions of this kind where nothing was said?

"*A.* I have made transactions of that kind — "

On cross examination Mr. Houston testified [page 26] : —

"*Q.* When you make these transactions in foreign ore are they made by word of mouth or is a sale note, or contract of sale, made between the buyer and seller?

"*A.* The contract is made verbally first, and then it is afterwards written and signed by each party.

"*Q.* And that is the universal custom between the buyer and seller?

"*A.* Yes, sir.

"*Q.* And in these written contracts that you speak of there is always, I believe, a provision for the allowance for moisture, is there not?

"*A.* That is usually so, and I think probably always. The forms are generally in type to be filled out in accordance with the agreement."

ISAAC FEGLEY, President of the Warwick Iron Co., testified [page 27] : —

"*Q.* Do dealers in imported ore, in buying and selling these ores, when there is water mechanically present and not chemically combined — do they treat this water, which is not chemically combined but merely mechanically present, as part of the ore?

the importer, as duties are not to be imposed upon doubtful interpretations.

Adams *v.* Bancroft, 3 Sum. 384, 387.
Hartranft *v.* Wiegmann, 121 U. S. 609, 615.

The reason of the rule applies whether the Court defines the word as within the judicial knowledge, or the jury upon evidence submitted to it.

In both cases it is an interpretation of a term used in a statute which is to result in imposing a burden according as it is interpreted one way or the other.

If the jury is in doubt which way it should be interpreted, *i. e.*, what meaning on the evidence they should place upon it, the importer should have the benefit of the doubt.

In other words, although the burden of proof is on the importer to prove the interpretation, yet if the jury are in doubt upon the whole evidence, whether this burden has been sustained, the doubt is to be resolved in favor of the importer and they would be justified in finding that he has sustained the burden.

WILLIAM S. HALL.

The synopses and opinions setting forth the views and conclusions in the premises of the heads of those Departments are presented in full in the following pages.

[Syn. 4183.]

IRON ORE, DUTY ON.

TREASURY DEPARTMENT,
September 8, 1879.

SIR: The Department is in receipt of your letter of the 27th ultimo, submitting the appeal (2952*f*) of the Bethlehem Iron Company from your assessment of duty, without allowance for increase of weight from moisture on certain iron ore imported by them, per *Eastborne*, April 25, 1879.

The applicants state that the ore in question was washed before shipment, and shipped in a wet condition, and that, on its arrival at your port, it contained a large quantity of water, for which no allowance was made in ascertaining the weight.

This statement is confirmed by the appraiser.

In a similar case the Department decided, under date of July 14 last, in a letter addressed to the collector of customs at Philadelphia, that no allowance should be made for the water in the ore, and that duty accrued on the total quantity landed as shown by the weigher's return.

Your decision is therefore affirmed.

Very respectfully,

By order: H. F. FRENCH,
Assistant Secretary.

COLLECTOR OF CUSTOMS, *New York.*

[Syn., 7520.]

INCREASE OF WEIGHT—IRON ORE, ALLOWANCE FOR.

TREASURY DEPARTMENT, *May* 17, 1886.

SIR: The Department is in receipt of your letter of the 11th instant, transmitting the protests and appeals (hereinafter mentioned) of Messrs. Naylor & Co. from your decision assessing duty at the rate of 75 cents per ton on the weight of certain iron ore imported into your port, as ascertained and reported by the United States weigher at the time of importation.

The appellants claim that the said ore had sustained an increase of weight during the voyage of importation by reason of absorption of moisture or sea-water, and that they should be allowed a deduction from the weigher's return of a certain percentage, alleged to be about 5 per cent on an average, on account of such increased weight.

Under the decisions of the Department, and articles 600, etc., of the general regulations, it is prescribed that "duties must be assessed on the actual quantity of merchandise imported, as shown by the returns of the weigher, gauger, or measurer, as the case may be," except that an allowance may be made for damage by sea water on the voyage of importation, or on account of excessive weight caused by "accident or unusual leakage," or absorption of moisture or sea water on the voyage of importation, but that before such allowance can be made the importer must file due application therefor with the collector of customs within ten days after the landing of the goods, and have the percentage of damage or increased weight, as the case may be, duly ascertained and reported by the appraiser.

Inasmuch, therefore, as the appellants in these instances have failed to avail themselves of the only remedy pointed out by the regulations, and as article 603 prescribes that in case of noncompliance with such requirements no allowance for such increase of weight shall be made, the Department must affirm your decision in assessing duties upon the weight of such ores as returned by the United States weigher.

In future importations of such merchandise, however, the importers may obtain an allowance for increase of weight caused as aforesaid on the voyage of importation, provided that they make due application under the regulations mentioned, and that the appraiser shall ascertain and report an allowance as aforesaid.

Nothing would seem to prevent the appraiser, when estimating the percentage of increase of weight, from considering thereport of the analytical chemists employed by the shippers and the importers of the ore as a basis for the purpose of definitely determining the quantity of dry ore imported, it being understood, however, that the appraiser shall use his own judgment in such matters, and shall only accept the reports of such chemists when satisfied that they are substantially correct.

* * * * *

Respectfully yours,

C. S. FAIRCHILD,
Acting Secretary.

COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

[18 Opins., A. G., 466.]

DEPARTMENT OF JUSTICE,
September 17, 1886.

SIR: I have considered the subject contained in your letter, with inclosures, of the 14th of September instant. You state Messrs. "Nailor & Co. now contend that the provision in the tariff act of the 3d of March, 1883, imposing a duty of 75 cents per ton upon iron ore, means ore dry at the temperature of 212° F., which, it is understood, is the test or standard adopted in commercial transactions of iron ore." * * * I will thank you to return all the inclosures, with an expression of your opinion as to whether the provision in the tariff act of the 3d of March, 1883, for iron ore should be construed in the manner contended for by the applicants to mean that duty shall be assessed on the ore in a dry state.

The provision of the act of the 3d of March, 1883, imposing the duty, is "iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, 75 cents per ton." (22 Stat., 497.) By this a specific duty of 75 cents per ton is charged on the importation of iron ore. The inquiry involved in yours is substantially, What is the legal meaning of *iron ore*, as used in the statute? In the interpretation of the customs laws Justice Story, in the case of *Two Hundred Chests of Tea* (9 Wheat., 430), declares "Congress must be understood to use the word in its known commercial sense." In the case of *Barlow* v. *United States* (7 Pet., 404) he repeats, "Congress must be presumed to use words in their known habitual commercial sense." The same rule for the definition of words has been reiterated in numerous cases ever since, the latest of which is as late as the case of *Drew* v. *Grinnell* (115 U. S., 477). This is the rule now. Whatever is the known commercial signification of

iron ore is that on which the duty is to be levied. If, as stated in yours, "iron ore dried at a temperature of 212° F., which it is understood is the test or standard adopted in commercial transactions of iron ore," be what is known in commerce as iron ore, it is the ore contemplated by the statute, and on that basis the duty should be levied.

I return herewith the inclosures which accompanied your letter.

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

[Copy, MS.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 29, 1886.

COLLECTOR OF CUSTOMS,
New York:

SIR: The Department is in receipt of your letters of the 16th and 21st instants, with inclosures, relative to the commercial designation of iron ore.

The matter has been the subject of much consideration by the Department, and the opinion of the Attorney-General as to the claim of certain parties that iron ore in its dried state at a temperature of 212° F. should be considered as the iron ore within the meaning of the tariff, was requested, and his reply, dated 17th ultimo, is inclosed herewith.

It will be noticed that the Attorney-General, following a long line of decisions of the Supreme Court as to the interpretation of tariff language, holds that whatever is the known commercial significance of iron ore is that on which the duty is to be levied, and if iron ore dried at a temperature of 212° F. be

what is known in commerce as iron ore, it is the ore contemplated by the statutes, and on that basis the duty should be levied.

The Department has made careful inquiry as to the custom of the trade in buying and selling imported iron ore. The great weight of evidence is to the effect that the iron ore of commerce is iron ore free from water not chemically combined, and that it is the custom to expel water which is only mechanically present before proceeding to ascertain the amount of ore which is bought and sold. To do this the ore is heated to 212° F. The rule is hereby established that for the purpose of ascertaining the amount of duty to be paid upon importations of iron ore, the weight of the ore when heated to a temperature of 212° F. shall be first found, and upon that weight shall duty be collected.

Entries of prior importations may be reliquidated and duties refunded, in accordance with this rule, in cases where the importers have fully complied with the provisions of section 2931, Revised Statutes, as to protest, appeal, and suit.

Respectfully yours,

C. S. FAIRCHILD,
Assistant Secretary.

[Telegram.]

WASHINGTON, D. C., *November* 5, 1886.

COLLECTOR OF CUSTOMS,
Baltimore, Md.:

Suspend until further orders all reliquidations of entries on account of allowance for moisture on importations of iron ore, under Department's decision of 29th ultimo.

C. S. FAIRCHILD,
Asst. Secretary.

[18 Opins., A. G., 530.]

DEPARTMENT OF JUSTICE,
January 19, 1887.

SIR: Your letter of the 12th instant submits for consideration substantially the whole question, whether the word "iron-ore" (as used in the tariff act of the 3d of March, 1883), is iron-ore dried at a temperature of 212° F., or iron-ore as it is delivered at the port of entry for weighing.

Thus broadly stated, the response to the question would involve a determination of facts as well as law, which, if undertaken, would involve an assumption of power not by law committed to me. Upon the disputed facts I can not pass, but upon the facts found by you and the briefs of argument made before you, it is not improper to announce such principles of law as may materially aid you in reaching a truthful result.

In an opinion rendered on the same subject on the 17th of September, 1866, the principle was declared that the iron-ore of the statute was to be interpreted as the "iron-ore of commerce." What the iron-ore of commerce was was left as a question of fact to be determined from knowledge possessed by or evidence submitted to you. The testimony laid before you was found to be inconsistent, the importer mainly testifying that ore dried at 212° F. is the iron-ore of commerce; the home producers that ore as ordinarily delivered for weighing is iron-ore by its commercial designation. This discrepancy of testimony, according to classes, between witnesses who are presumed to be equally upright, would suggest that the statements of one or the other, or both, are to some degree influenced by interest, or that they each testified from a partial view of different facts by giving different interpretations to the word "commerce." The uncer-

tainty arising from this discrepancy of testimony, so far as it may arise from the influence of interest, may be overcome by calling upon those who buy both imported and home-produced iron-ore. Such testimony would seem to be easily accessible, for where there is a seller, such as the importer or home producer, there must be a buyer, belonging to neither of the classes of sellers, who would apparently be disinterested. So far as the discrepancy in the testimony arises from the fact that the witnesses testified to different facts, arising from a different understanding of the words "iron-ore of commerce," the weight of evidence can be determined by comparing the witnesses' understanding of the words with the true signification which should be given to them as used in the interpretation of customs cases. By the act, the duty is a specific one on iron-ore.

"Iron ore," as thus used, is generic, embracing all the different species of iron ore, regardless of their price, value, or accidental component chemical ingredients. The word "commerce" is to be understood as the commerce of our own country as it is understood by English-speaking Americans. It, too, is to be understood in its generic sense, with this exception, that it is limited to our own commerce in our own markets, and embraces both foreign and domestic, as expressed by Justice Story in the *Two Hundred Chests of Tea* (9 Wheat., 480): "Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists or geologists or botanists; it applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as in our foreign traffic."

The same thought is substantially repeated in the case of *Barlow* v. *The United States* (7 Pet., 410), as follows: "Congress must be presumed to use the words in their known commercial sense, not indeed in that of foreign countries, if it should differ from our own, but that known in our own trade, foreign and domestic." The same view is corroborated in the case of *Elliott* v. *Swartwout* (10 Pet., 151).

"Commerce," as used, then, in this connection, is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic of our own markets; but especial contracts in which the term "iron ore" is defined in the contract by special description or qualifying words would be no evidence of the general commercial signification of the term.

But if, from the application of the facts to these general principles, you are still unable to determine from the evidence before you what state the ore must be in to be the iron ore of commerce, other considerations may aid you. The intent of the lawmaker is the law, and outside of the words some reflected light may be invoked. Other earlier statutes have imposed customs duties on iron ore, which have been collected, probably, for a very considerable time before the passage of the act of 1883. In the administration of such laws, doubtless, departmental practice has established what was understood and acted upon as to the collection of customs on iron ore. If that practice and departmental interpretation were of long standing, and uniform, prior to 1883, if the interpretation had been false and vicious, it is to be presumed Congress would have guarded against a like interpretation upon the passage of the act under consideration. But, as no such guards are found indicating a repudiation of any prior interpretation, the presumption is very strong that the legislator, in

the enactment of the act of the 3d of March, 1883, adopted and understood the iron ore of commerce to be what the departmental practice had established it. On the 8th of September, 1879, a decision was rendered by the Secretary of the Treasury, No. 4183, ruling that "the total quantity landed as shown by the weigher's return * * * without allowance for increase of weight from moisture on certain iron ore" was subject to duty. If this decision was in accordance with departmental practice prior to that date, and was adhered to afterwards as the rule, it would be a pregnant fact to guide you to the same conclusion.

The result of the legal principle above considered is substantially—

(1) In customs laws, as in all others, the intent of the lawmakers is the law.

(2) Where, in the expression of that intent, a name is used describing an article which has a well established commercial signification, that commercial signification should be adopted.

(3) When the name is general and the tariff specific it embraces the whole class, and questions of price, value, or accidental chemical components are immaterial.

(4) The commercial signification of a name is that which those engaged in foreign and domestic sale, purchase, and exchange generally adopt to describe the article.

(5) If it be disputed what this commercial designation embraces, it is to be determined upon a clear preponderance of evidence.

(6) The ordinary rules of evidence are to be applied with reference to interest, character, and weight of testimony to be received from those engaged in or familiar with commerce, trade, and traffic in the article.

(7) Where a clear preponderance of evidence can not be adduced, departmental construction tacitly approved by Congressional recognition should turn the scale and be accepted as sufficient evidence of the legislative intent.

I am, very respectfully,

A. H. GARLAND.

THE SECRETARY OF THE TREASURY.

[Syn. 8025.]

IRON ORE AS KNOWN TO COMMERCE IS THE ORE IN ITS NATURAL STATE, IRRESPECTIVE OF MOISTURE.

TREASURY DEPARTMENT,
February 3, 1887.

SIR: Since Department's instructions to you of the 29th of October last, concerning the commercial meaning of the term "iron ore," as used in schedule C (T. I., 144) of the existing tariff act, and the suspension of such instructions by its telegram to you of the 5th of November last, I have duly considered a large amount of new testimony both for and against the proposition laid down in such instructions, that such term means iron ore when dried at a temperature of 212° F.

I have also received a further opinion from the Attorney-General, dated January 19, 1887, a copy of which s inclosed herewith.

In the light of such new testimony and of the opinion of the Attorney-General, as now given, I decide that iron ore as known to the commerce of this country is the ore in its natural state in respect of moisture.

The said instructions, therefore, are hereby revoked, and you are directed to assess duty as heretofore upon imported iron ore—that is to say, upon the actual weights as reported by the United States weigher at the time of importation.

It will be understood, however, that in the case of importations of iron ore, which importers may claim to have increased in weight on the voyage by the addition of sea water, articles 600, etc., of the Regulations apply, and that importers, upon making due application thereunder, may obtain such allowance as may be estimated and reported by the United States appraiser.

Respectfully, yours,

DANIEL MANNING,
Secretary.

COLLECTOR OF CUSTOMS,
New York.

It is respectfully submitted that these cases of moisture in iron ore, as presented, argued, and determined in the Executive Departments of the Government, set forth in themselves and by way of reference and citation about all of the facts and arguments needful to determine the case at bar.

THE CHARGING ACT.

The tariff act of 1883 (22 Stat., 491,497) directs that "there shall be levied, collected, and paid upon

Schedule C.—Metals.

Iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, seventy-five cents per ton. Sulphur ore, as pyrites or sulphuret of iron in its natural state, containing not more than three and one-half per centum of copper,

Office Supreme Court U. S.
FILED,
APR 27 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN W. S. EARNSHAW, PLAINTIFF in error,
vs.
JOHN CADWALADER, COLLECTOR. } No. 348.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN W. S. EARNSHAW, PLAINTIFF in error,
vs.
JOHN CADWALADER, COLLECTOR. } No. 348.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The entitled suit and another involving a similar issue were tried together before Judge Butler and a jury in the circuit court of the United States for the eastern district of Pennsylvania in October, 1888.

Testimony was received at length, and the jury was duly charged, whereupon a verdict was found in favor of the defendant, and judgment was entered accordingly.

The question at issue related to the amount of duty exacted upon certain importations of iron ore which were brought from Spain in the year 1887.

The question involved, elaborated so as to fully present the proposition, is, shall the duty of 75 cents per ton imposed on imported iron ore be placed at the ship's side upon the "Government weight" of the commodity according to the finding and record of the weighing officers, or shall the official weight be reduced by an allowance sufficient to render the ore as light as though it had been raised, under conditions favorable to evaporation, to the heat of boiling water.

The suing importer makes claim to this allowance; he has the laboring oar; he must establish his lawful right to recover, or he must fail in his suit.

Although the question which this court is now asked to pass upon may affect the duty on large quantities of ore imported prior to the tariff act of October 1, 1890, it is not of future consequence, because that act (26 Stat., 574, par. 133), in the exercise of abundant caution, provides:

> That in levying and collecting the duty on iron ore no deduction shall be made from the weight of the ore on account of moisture which may be chemically or physically combined therewith.

HISTORICAL.

The question in controversy in this suit has been the subject of interesting and instructive consideration and action in the Treasury Department, and also in the Department of Justice.

seventy-five cents per ton: *Provided*, That ore containing more than two per centum of copper shall pay, in addition thereto, two and one-half cents per pound for the copper contained therein."

THE PROTEST.

The material portion of the protest is as follows:

I claim that you err in exacting duty on the full weight of 1,298,840 pounds, and I pay the same under protest, because the importation is dutiable as merchandise which is described as "iron ore" in act of March 3, 1883, chapter 121, section 6, Schedule C, and "iron ore" was and is understood among dealers in and consumers of such iron ore in this country to refer and did refer to iron ore in the condition of dryness in which it is sold in trade, which condition of dryness is usually ascertained in trade by subjecting the iron ore to a temperature of 212° Fahrenheit; but you have levied the rate of seventy-five cents per ton on my importation when mixed with and the weight increased by a considerable per cent of water, thereby making me pay, in violation of law, that rate of duty on water, because the iron ore of commerce, to which the said tariff law applies, is iron ore in a dry state, *i. e.*, free from water not chemically combined, and because, although the method of ascertaining the amount of such mechanically mixed moisture is well known, easily applied, and actually used between buyers and sellers of such ores in this country, you have refused to ascertain the true taxable weight of the iron ore of this entry in this or any other way, or make any allowance for such mechanically and accidentally combined moisture in ascertaining the weight.

Very respectfully,

J. W. S. EARNSHAW.

ARGUMENT.

Although this case is brought up by a writ of error, testimony to the extent of more than seventy pages, and including nearly all of that given upon the trial, is included in the bill of exceptions.

This course necessitates the abstracting and classifying of the evidence relating to several lines of proofs.

I.

THE CUSTOM OF DEALERS AS TO AN ALLOWANCE ON ACCOUNT OF THE MOISTURE IN THE ORE DOES NOT SUSTAIN PLAINTIFF'S CONTENTION.

No statute is found that recognizes in any manner any deduction from the weight of iron ore when imported because of its containing moisture. It is well known that the ore is weighed by the Government officers at the ship's side, and the weight so taken is entered in a record book and becomes a public record of the Government weight of the importation. As no statute authorizes any deduction from this Government weight in the imposing of the duty of 75 cents per ton upon the importation, it is insisted that no foundation exists for the claim made in this case that the Government weight should be reduced for duty purposes and the ore considered as in a dry state. It is repeatedly asserted in the record by different witnesses that dry ore is a thing unknown to commerce or trade. The plaintiff seeks to force upon the Government the custom adopted by a few dealers in this country in foreign iron ore, and seeks to compel the Government to accept its

rules as to weight from these dealers instead of charging the duty upon the weight at the ship's side.

Although the record shows that it has been a custom for several years in this country between dealers to allow for the moisture that would be expelled by heating the ore to 212°, the case shows that this allowance has been based upon contract and stipulation, and that no custom has existed authorizing this allowance, even among dealers, except where the conditions of the contract authorized such an allowance.

The witness Bent (p. 16) says that in 1883 and prior thereto there was a custom of trade for deducting moisture from the ore before paying therefor according to its weight. The same witness (p. 37) says that the iron ore of commerce is understood among importers and traders to be iron ore dried at 212°, and that this is the universal understanding. He says (on the next page) that this relates only to imported ores, and, also, that ore is delivered as it comes from the ship; and, also, that the allowance would be based upon a contract. This witness also asserts that he would claim this right by custom, if there was no contract, but does not testify to the existence of any custom independent of the contract.

The witness, Wister (p. 22), also testifies to the deduction and claims that it is a prevailing custom. When asked as to the arresting of the custom upon a contract, he said:

> I don't think prudent dealers are apt to make contracts without speaking of it. It is mentioned in a casual way. This is understood, as a rule.

The following suggestive evidence appears at the top of page 23: The witness says foreign ore is always dealt in exclusive of the moisture.

> The COURT. That might be, but it might be the result of a contract.
>
> Mr. HALL. I submit that if every contract in foreign ore was made in that way that would be evidence of the usage.
>
> The COURT. It would require the contract to refer to it.

It is stated (on p. 24) that the custom of excluding moisture in imported ore began in 1878, 1879, or 1880, or along there. The witness says (p. 25) that it was the custom of trade to make a double-sale note, a double-sale contract; and that one went to the purchaser and if not satisfactory it was returned; that the custom was to use written or printed contracts, and, in fact, that all sales were covered by a written contract, and that the contract contained a stipulation for the allowance of moisture. The witnesses introduced on the part of the plaintiff testified that it was the custom of trade to make an allowance for moisture between seller and purchaser in handling imported iron ore, but the witnesses showed that the custom was based upon and was exemplified by a condition in the contract which passed between seller and purchaser.

The witness Houston (pp. 26, 27) says that the forms of contract were generally in type, to be filled out in accordance with the agreement, and that the provision for the allowance of moisture was contained therein usually, and he adds, "I think probably always."

The witness Fegly (p. 27) says that water mechanically in ore is not treated as part of the ore in trade, and

such was the case in 1883, and also prior thereto. He states (p. 28) that the contracts for the purchase of ore are sometimes written and sometimes contained in correspondence; that in the written contracts there is a stipulation that there shall be the allowance made for moisture. The witness states that this is universally so.

The witness Thurston (p. 29) testifies to the same custom of the allowance for moisture. This witness stated, however, that this custom was not universal, and gave the case of the Hodbarrow ores as an exception. He states these ores were exceptionally good in quality, and the parties selling refused to sell them except at the price per ton. This witness adds (p. 37) to the Hodbarrow the Alamera ores sold by the same man. As to these ores no allowance was ever made.

This witness says (p. 30) that the sales of foreign ore are by written or printed contract generally, and adds (near the foot of the same page) that the seller is paid "according to the specifications of the contract." This witness also says (p. 31) that the iron ore is delivered at the furnace in whatever condition it comes, and as to that coming over the ship's side, it may be dried on the way and it may be rained on on the way.

The witness Houston is recalled, and from his testimony (p. 32) it is clearly shown that the allowance for moisture is in accordance with the stipulations of the contract made between the parties.

The witness Earnshaw testifies (p. 33) to the method of sales and allowances by contract. He statesthat the price is agreed upon and that in most cases a memorandum in the form of a letter is written confirming that and saying,

"all other terms as usual," and that the formal contract is afterwards made out and forwarded for the signature. He says: "It may be three or four days; it may be a week; it may be a month; I have known cases where it has been three months after the contract had been completed before the contract was signed." Witness continues (pp. 34, 35), that the contracts are mainly confined to foreign ore and are printed; that they were formerly written, but that the terms were always the same and that they were printed and had been so used probably since 1880. Witness gives a clause in the printed form as follows:

> That each cargo is to be sampled on arrival and tested by Booth, Garrett & Blair for metallic iron and moisture in sample dried at 212°, such determination to be final, half the cost of sampling and analysing to be borne by each buyer and seller.

The witness is asked (p. 36) if the contracts did not provide for "so many cents per unit of metallic iron per ton of 2,240 pounds." He answered: "No; I think the clause says that the weight is to be custom-house weight, less the moisture," but he finally added (p. 37), on looking at the blank, that "the ton of 2,240 pounds is of dried ore."

The witness Weeks says (p. 45) that certain parties put in the stipulation for moisture and certain others do not; and on the next page says that in some cases ores are sold with an allowance for water and in others they were not.

The witness Stackhouse says (pp. 56, 57) that a stipulation for the allowance of moisture in ores is in vogue, and adds that he thinks it is altogether a matter of special

contract. He explains the origin of the use of this stipulation in contracts. He says it came into use shortly after 1880, and may have been used exceptionally before that time; but says that "during the year 1880, what is called the 'boom year' in business, there were immense quantities of foreign ore sent in, and the foreign miner, either through his anxiety to push out a large product and sell it at a high price, or thinking that the purchaser would have to take what he delivered him, allowed the quality of a number of the ores to run down very considerably." He also explains that in domestic ores the miner had a certain standard, and his interests required him to keep it good, while many of the foreign ores were handled by traders, who bought and resold, and were, to some extent, free from responsibility.

The witness Marvel testifies (p. 63) to the stipulation as to the amount of moisture that foreign ores contain. He states that he is familiar with domestic iron ores that resemble these foreign ores and says: "I never knew ore to be bought, sold, used, or dealt in except by the ton in its natural condition. That is the condition in which it is bought, sold, and used. I never heard any such terms until I heard of the contracts in this case." He says he has heard of these contracts a little over two years before and adds that he never heard of the special method of contract for foreign ores until about two years before. This witness says (p. 64) that "dried ore is never delivered; it is not an article of commerce; it is never dealt in, never bought, and never sold."

It may be stated here that several witnesses repeated substantially this allegation, and there is no evidence in the

record tending to controvert it. Consequently the only question involved in the controversy is relative to an allowance claim on account of the presence of water in imported iron ore.

The witness Witherly says (p. 70) that he does not consider that such a commodity as dried iron ore exists commercially. He says, also, (p. 71) that the term iron ore, as applied to ores of this character, includes and means the same things as when used generally—covering the water as well as all foreign ingredients—and that there is no difference between the foreign and domestic ore of the same class.

The witness Stanton (p. 73) says that his firm dealt in foreign ores, and that his experience varied as to the contract stipulating for an allowance for moisture. He says the firm had bought both ways; that they had bought by the ton and also by the unit of iron. He says: "During the last two years we have bought much more ore by the ton than we have by the unit," and that the greater part of the foreign ore that they had purchased within the last year or two had been by the ton, without regard to the moisture contained in it. He says (p. 74) that the commodity in each case is called "iron ore," as it comes over the side of the ship. This witness adds that there is no such commodity known to dealers as dried iron ore.

The witness adds (fol. 170) that he should say that fully 70 per cent of the purchases of his firm during the last two and a half years had been made by the ton, and that these purchases covered from 40,000 to 50,000 tons. He says that the first purchase they ever made by the unit was in the latter part of 1880. He says (p. 75) that in purchas-

ing by the unit the moisture was deducted from the "Government weights," and he refers to Government weight again at the foot of the same page. He states his remembrance that the purchases made of Reed & Co. were without allowance for moisture, and that purchases made from Earnshaw & Naylor, which allowed moisture, were put in the form of a special contract and that the printed form of contract was used.

The witness, Ely, states that no such commodity was known among dealers as dried iron ore; that he never heard of such a thing; and he explains (pp. 78, 79) the method of handling domestic ores, and says that they were taken at the docks or at other places of weighing by the consumer without any allowance whatever for such moisture as might be in the ore; and that this practice was universal as to all American iron ores. (This fact as to American ores is nowhere controverted.)

The witness, Hartman (p. 80), says that the blast furnace is charged with a ton of 2,240 pounds of iron in its natural state, as it is dumped in the stock house, and without an allowance for moisture—that the question of allowance for moisture is not considered at all in charging the furnace.

It is respectfully submitted that the deduction to be drawn from a review of the testimony is that the only custom claimed by the plaintiffs in this case is not a custom of dealing among traders, but a custom of inserting special stipulations in contracts for the delivery of foreign ores. It is submitted that the fact that no such custom was ever applied to a purchase or sale of Ameri-

can ores, even by stipulation in contract, is sufficient to show that no legal or valid custom existed.

It is submitted also that some foreign ores were always sold by the ton, and without allowance.

It is submitted also that the custom of inserting an allowance specification in written contracts made between dealers in foreign ores is without influence or effect upon the action of the Government while imposing its duty on material charged with a specific duty per ton.

And it is submitted that the fourth assignment of error and the corresponding point IV set forth in the brief of plaintiff's counsel are not established.

II.

THE NATURE AND CHARACTER OF IRON ORE AND OF THE IRON ORE IN CONTROVERSY PRECLUDE AN ALLOWANCE OR DEDUCTION OF THE MECHANICALLY COMBINED MOISTURE.

(*a*) *Definitions of iron ore.*

Such a thing as the pure metal in a natural state is scarcely possible.

It is believed that foreign substances are both chemically and mechanically mixed in all ores.

This is recognized at length in the article upon "Iron" in the Encyclopedia Britannica (V. 13, p. 278).

It is said (p. 285) as follows:

> 5. *Ores of iron.* Cutting instruments of a rough character have been fashioned by savage and semi-savage nations from meteoric iron; but the sources from which the metal is practically extracted are those ores

in which the metallic properties of the element are masked by its combination with nonmetallic substances.

And that:

> Owing also to the variable intermixture of gangue of various kinds with the veins of iron ore, the physical properties of the substances become more or less altered, so that it is often difficult to classify a particular ore otherwise than in broad, general terms.

The very object of smelting is to extract the iron from the accompanying impurities, both chemical and physical.

The Century Dictionary, under the head of "Ore" (p. 4147), says:

> The ore as mined is usually more or less mixed with veinstone, and from this it is separated, as completely as may be convenient or possible, by dressing. It then usually goes to the smelter, who, by means of a more or less complicated series of operations, frees it from the worthless material which still remains mechanically mixed with it, and also sets it free from its chemical combination with the substances by which which it is mineralized.

Webster's International (p. 788) defines iron ore thus:

> Iron ore (*min.*). Any native compound of iron from which the metal may be profitably extracted.

The following definitions of iron ore, special or general, appear in this record:

The witness Garrett says (p. 8) that iron ore "is an oxidized or a sulphurated combination of iron and more or less sandy matter and clay, possibly." He also speaks of the combination with phosphorus.

Defendant's witness, Bent, says (p. 16), "my definition of iron ore would be, a natural product combined with the various other elements. Its commercial value is a source of iron."

The witness Weeks says (p. 40), "I understand iron ore to be the mineral iron ore in its natural or crude condition, as it comes from the mines, properly cobbed or selected for shipment from the mines." He says (p. 41) that his definition applies to foreign as well as domestic ore.

The witness Stackhouse says (p. 56) that the term iron ore means the ore as it is found in the body of the earth, and whether taken from the earth or on the car or wherever it may be.

Witness Marvel says (p. 61), "Iron ore is that metallic substance which, taken from the mine in its crude condition, prepared and separated from rock and earth, and in its utmost metallic purity, according to the natural character of the ore in that form in which it is seen and marketed, in which it is known, used, and bought and sold as iron ore."

The witness Witherly says (p. 70) that "iron ore is the product of the mine in its raw state, briefly stated. Possibly they take the rock out."

Q. Containing what?

A. Containing certain units of metallic iron, oxygen, silica, phosphorus, perhaps lime—no end to ingredients—fifteen or twenty.

Q. How about water?

A. Water both chemically and mechanically.

The witness Ely (p. 77) says that iron ore means the same among dealers in foreign iron as it means in domestic production—the article that is produced at the mine in the condition ready to ship to the consumer. This witness also says (p. 78) that iron ore means iron ore ready for market, including all its constituents—moisture or water in mechanical or chemical combination, silica, alumina, phosphorus, and whatever else may be in it—three or four other constituents. Witness added oxygen also.

(*b*) *The moisture contained in different iron ores.*

It appears that the Porman imported ores contain 5 per cent of moisture. The other ores named on page 7 contained from about 6½ to over 12 per cent of moisture.

Two Camerata ores showed one 12 and the other 4 per cent of moisture.

A witness says (p. 10) that foreign ores as well as those mined here vary in moisture from a few hundredths of 1 per cent up to 16 per cent. Samples of these importations are shown (upon page 14) to have contained from less than 4 per cent and more than 8½ per cent.

The witness Bent (p. 15) states that moisture occurs in ore from 1 per cent up to 12 per cent. It is stated (p. 20) that all iron ores have a varying percentage of water in mechanical combination.

The witness Wister (p. 21) says that all ores contained moisture which is not chemically combined, as far as his knowledge goes.

The witness Fegly (p. 28) says that he has known moisture to run from 1½ per cent as high as 8 per cent.

Alfred Earnshaw, brother of the plaintiff (p. 34), places the moisture from a quarter of 1 per cent to 25 per cent; perhaps this evidence may be classed with that which appears at folio 33, on page 14, both subject to considerable reduction.

It is stated, however, by the witness Marvel (p. 62) that Bogg ores would sometimes run as high as 30 per cent, and he states that these ores are not used so much nowadays because of their inferior quality.

It would seem to be a fair estimate of the moisture to be ordinarily found in the softer ore that it would run from 2 or 3 per cent to 12 per cent or 15 per cent. The witness Ely (p. 79) gives his estimate of the moisture as running from 1 per cent to 12 or 15 per cent.

(*c*) *The ingredients of this iron ore, as shown by the record.*

The witness Garrett says (p. 8) that the ore contained besides iron, sandy matter and clay and phosphorous and water.

The witness Sharples (p. 12) says that silicate is found in the ore and other gangue also, and other articles. Gangue is defined to mean the accompanying rocks. The witness says that on taking out the ore it is sorted over, and that portion which can not be readily separated from the ore is left with it, together with the oxide of iron, and this constitutes the ore of commerce.

The testimony on page 17 seems to recognize that silica, sulphur, lime, platinum, and copper may be found more or less in iron ore.

The witness (p. 17) shows that iron ore may contain silica, oxygen, alumina, phosphorus, sulphur, and water.

It is stated (p. 42) that domestic ores have the same combinations and qualities as foreign ores.

The witness, Witherly (p. 70), says that iron ore is the product of the mine in its raw state, with possibly the rock taken out; and that such ore contains units of metallic iron, oxygen, silica, phosphorus, perhaps lime—no end of ingredients—fifteen or twenty; as well as water, both chemically and mechanically.

It is not only a fair but a necessary deduction from this evidence that water is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign. It is also plain that iron ore, instead of of being pure iron, is, as a rule, composed of from 40 to 50 per cent of other matter. The several ingredients, including water, which in greater or less amounts are always found in combination with the crude iron, constitute the commodity iron ore.

The Camerata ore is stated (p. 14) to have contained 54.500 per cent of metallic iron; the importation by the *Marie Repetto* contained 51.987 per cent; that coming by the *Galileo* 51.400 per cent, and these percentages appear to show fairly the proportion of valuable and worthless ingredients in the commodity called ore.

It is plain that plaintiff's whole case stood upon proving that the term iron ore, when applied to his importation, was limited in its meaning to dry ore—ore with the water excluded. It is submitted that a verdict given in plaintiff's favor under the proofs would have been wholly unsupported by evidence.

Therefore, it is submitted, the third specification of error and the corresponding point III set forth in the brief of plaintiff's counsel are not made good.

III.

THE STATUTES IMPLIEDLY PROHIBIT THE ALLOWANCE SOUGHT.

The article is ore. It is as clearly *ore* with the moisture in it as it is when dried.

The reduction sought by the importer is not an *exclusion* or an *extraction* of moisture; it is an *allowance* by the Government—upon the *Government weight* of the thing imported as it is imported—with the view of making the mass, the substance imported, different from what it is when the importer presents it. The importer demands an allowance for the moisture which he brings in his ore.

The unloading of a vessel must be in accordance with a permit duly issued, and a public record of the articles imported is duly made.

The "Government weight" of the thing imported is ascertained under the Revised Statutes as follows:

> SEC. 2890. The weighers, gaugers, and measurers, employed in the service of the revenue, shall within three days after any vessel is discharged, make returns of the articles by them respectively weighed, gauged, or measured out of such vessel. Such returns shall be made by the weighers, gaugers, and measurers in books to be prepared by them for that purpose and kept in the custom-houses.

It is claimed with great confidence that when the ore brought into port by the plaintiffs was weighed from the ship's side by the weighers and a correct record of the weight was made under the statute, that ascertained and recorded weight became the Government weight of the ore for the purpose of the imposition thereon of the duty of 75 cents per ton.

Here is a weight of an imported material duly ascertained and recorded, and no statute exists which authorizes it to be changed or reduced.

This weight fixes the number of tons imported and the duty attaches to the ore upon its entry.

If the importer wishes to pay only on dry ore he must bring dry ore. No ore comes absolutely dry. None comes absolutely pure. Iron ore is not pure iron. There is stone, earth, water, sulphur, and gangue, and more than a dozen foreign ingredients in it, some chemically and many mechanically combined.

No statute requires or authorizes the *allowance.*

The only custom claimed upon is a custom between dealers of *contracting* in writing to allow. No case is shown in the record of an allowance between dealers except it was based on an agreement *previously made,* to allow for moisture.

The witness, Bent, when pressed by the court (p. 38), says he would claim an allowance (of a seller) by custom, but he does not testify to the custom.

As the dealer's allowance is based upon an agreement, no dealer's allowance would be assumed in cases of no contract.

But there is no reason why a rule of allowance existing between or among dealers (were one shown to exist) should come into force of itself between the Government and the importer.

Were a custom of trade established as between buyer and seller, as such, the Government might possibly be bound by it, when it buys or sells, but there is no reason in claiming that when the Government exercises its taxing function it must adopt the practice of dealers. The statute is the warrant of the Government. It is not bound to construe the statutes in subjection to the customs of dealers.

The importer has a right to bring in ore only upon compliance with the statute; the statute authorizes entry upon payment of an impost of 75 cents per ton—of the ore—the thing brought; and the ton is declared to be 2,240 pounds.

All ore must of necessity have some mechanically combined moisture. The statute is silent as to the moisture, as it is as to any other substance mechanically or chemically intermixed with the iron of the ore.

IV.

THE RULE AS TO FREIGHT SUPPORTS THE DEFENDANT.

It appears from both sides that freight is charged upon these foreign ores on their way to and after their arrival in this country at the actual weight of the ore, including water and other ingredients.

Why should a private custom, limited to a class of dealers, and applied by signed specifications, control the United States in exercising its taxing function any more than it controls the freighters by land or water?

The conclusion shown is that no general custom exists to estimate or consider iron ore at the weight of dry ore, but the practice which plaintiff asks to have established and applied to the United States is limited to dealers in a single class of iron ore in their transactions with each other.

V.

THE STATUTE PROVIDES FOR THE PROTECTION OF IMPORTERS AGAINST INJURY FROM WATER IN SOME CASES.

The importer is protected from losses by reason of water under Revised Statutes, 2927, as elaborated in Regulations of 1884 (Nos. 600–604).

The methods and scope of this protection and allowance are sufficiently set forth in synopsis 7520, heretofore quoted in this brief.

Under this statute and the general regulations thereunder some relief is given to importers by way of reducing the duty.

This provision with a long practice under it practically excludes a different, nonstatutory, new method that has never been deliberately recognized by the Government, and that has never had any continued existence.

VI.

QUESTIONS SUGGESTED BY POINT 1 OF THE BRIEF OF COUNSEL FOR PLAINTIFF.

(*a*) It is argued that water in ore is to be considered like dirt coming with imported potatoes and like clay, sand, and gravel, which was on one occasion mixed with imported flaxseed. It is stated (on p. 43 of the record) that some of the iron ore shipped from the Lake Superior regions carries so much moisture in it that it shakes like jelly, and from that fact is called "pudding;" that the water will leak from the cars containing this ore. Yet the testimony is uncontradicted that this mass as it is shipped, and as it is left upon the docks, and sold to the consumer, and received by him, containing such quantities of water as it may, is known as ore in the commerce and trade of the United States. If we were to reason by analogy as to the allowance of water in an importation, we could refer with more directness to the article of hay. By the tariff act of 1883 a duty of $2 per ton was imposed upon hay, and no method is provided by statute for allowance for water contained in it, except in the case of imports damaged by water, which is considered elsewhere.

If a sloop load of hay came into Detroit from Canada and the importer alleged that it had been recently increased in weight by water, it is submitted that no method exists for excluding the moisture from the weight of the hay, upon which weight the duty is imposed. If one brings across the northern border tons of loose hay which has been subjected recently to rain, the importer pays the

duty upon the weight of the thing he brings. He might as reasonably ask when bringing hay from the field fresh cured to have the article reduced to kiln-dried hay as to seek an allowance for moisture which is contained in his importation. In the case of the potatoes and flaxseed referred to the things excluded were never any part of the commodity, and were never necessarily mixed with it, but were foreign substances, plainly discoverable, and readily eliminated, and their presence in such quantities as to attract attention was a suggestion of fraud.

THE ACT OF 1890.

(*b*) The opposing counsel also claims (pp. 7, 8) that the act of October 1, 1890 (26 Stat., 574) is some evidence that Congress admitted that under the law of 1883 an allowance for water was authorized.

It is true that this last enactment prohibits the allowance of moisture as to importations of iron ore, but the history of these importations, as shown in the proceedings of the Departments, heretofore appearing in this brief, render it plain that this provision was inserted to save farther trouble and annoyance, and not upon any other ground. Plainttff claims that this Congressional proviso admits that without it an allowance for water could be demanded. It is sufficient to say that the rule claimed and applied to the importation in question would require without a proviso the exclusion of water *chemically* combined as well as that in physical combination. The proviso is, that in levying duty on the ore no deduction shall be made on account of moisture which may be *chemically* or *physically* com-

bined therewith. If this enactment were proof that the previous statute allowed for moisture physically combined with the ore, it would also prove that such previous statute allowed for water chemically combined with the ore, because the same rule of construction must be applied in both cases.

It is manifest that no statute ever existed which permitted an allowance for the water chemically combined in the iron ore, and the enactments which relate to moisture chemically, and to that mechanically combined, are the same.

(*c*) It is claimed on page 8 of the plaintiff's brief that samples and assays are sometimes resorted to to ascertain duty, and the statute authorizing the sample and assay of lead ore and lead dross is quoted. It would be going very far to say that such a sample and assay would be lawful if there were no provision of the statute to authorize it, and the same conclusion will apply as to iron ore.

(*d*) Plaintiffs' counsel concludes this point by invoking a rule of doubt and by asking its application for the benefit of his clients in this case. The citation is to the last clause of *Hartranft* v. *Wiegmann* (121 U. S. 616), which reads:

> But, if the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed upon the citizens upon vague or doubtful interpretations.

It will be noticed that the statement here is that duties are never imposed upon vague or doubtful interpretations. In the case at bar the imposition of the duty is distinct

and undisputed; there is no doubtful interpretation here. The statute commands that seventy-five cents per ton shall be paid as duty. There is nothing vague or doubtful in it. The importer seeks to obtain an allowance that shall reduce this duty which is distinctly imposed. Therefore, the rule which he invokes is without application.

VII.

THE JURY COULD HAVE HAD NO DOUBT AS TO INTERPRETATION, AND THE DOUBT RECOGNIZED BY THE DECISIONS DOES NOT APPEAR IN THIS CASE.

By plaintiff's point V it is admitted that under the ruling of the court the burden rested on plaintiff below of satisfying the jury that the term iron ore included the water mechanically present.

It is then said that "If, upon the whole evidence, they were in doubt what the interpretation was, the doubt should have been resolved in favor of the importer, as duties are not to be imposed upon doubtful interpretations."

Here seems to be a curious transposition of the rule as to the interpretation of a word or clause imposing a duty over to the rule applied to the party that has the burden of proof, and the ambiguities of the word "doubt" are made use of.

The last clause presents the pith of this contention, saying:

> In other words, although the burden of proof is on the importer to prove the interpretation, yet if the jury are in doubt, upon the whole evidence,

> whether this burden has been sustained, the doubt is to be resolved in favor of the importer, and they would be justified in finding that he has sustained the burden.

This argument may be illustrated by still other words, thus: Although the burden of proof is on the importer to prove the interpretation, yet if the jury are in doubt as to whether he has proved his position or not, he is entitled to a verdict, because, in cases of *doubtful interpretations*, the importer is, in the construction of the word or clause, entitled to the benefit of the uncertainty therein.

It is submitted that the doubt referred to in *Hartranft* v. *Weighman* (121 U. S., 615) and in the case of the *American Net and Twine Co.* (141 U. S., 474), is very different from the doubt arising from failure to satisfy the jury by a preponderance of evidence.

VIII.

TESTIMONY AS TO THE CUSTOM OF DEALING IN AMERICAN ORES WAS PROPERLY RECEIVED.

The second point presented by plaintiff in error charges that—

> The court erred in admitting evidence that the iron ores of this country, which resemble, and are like, and have the same characteristics of the iron ores in question, are dealt in in this country without an allowance for moisture.

(1) Taking the whole of plaintiff's proofs into consideration, no case is made that would legally authorize a verdict or support a judgment in his favor, and therefore

if the testimony complained of were not material it would be harmless.

(2) But this testimony was justified by that put in by plaintiff. Some of plaintiff's witnesses alleged that the term "iron ore" applied to this description of ore meant "dry ore."

To answer this the court permitted defendant to show that in dealing in American ores of precisely the same character no such limitation was known.

This testimony was received as bearing upon the *weight* and *credibility* of plaintiff's evidence. The views of the court appear in the record at page 44.

CUSTOM.

The evidence was proper under the claim of custom set up by plaintiff.

A practice in order to become a custom or usage must be ancient, generally known, certain, and reasonable.

It must be notorious and uniform. This alleged custom of allowance of moisture was not ancient, as it ran back only to about 1880; it was known only to dealers in foreign iron ores; it was certain only when based upon a written stipulation, and whether reasonable or not is a matter for argument; it had no general notoriety, and it was not uniform, as it omitted American ores. The witnesses Marvel and Stanton each bought much foreign ore without any allowance, and a witness testifies without being contradicted, that the foreign Hodbarrow ores and the Almera ores are not subjected to any allowance for moisture.

Besides all this there is nothing in the nature of a "custom" that justifies its use in the case at bar.

LASTLY.

It is respectfully submitted that no proper or sufficient reason is shown for a reversal of the judgment.

A. X. PARKER,
Assistant Attorney-General.